United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

APRIL TERM, 1910.

No. 2122.

710

No. 8, SPECIAL CALENDAR.

THE UNITED STATES ON THE RELATION OF FRANCIS M. WALCOTT, APPELLANT,

vs.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED FEBRUARY 15, 1910.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

APRIL TERM, 1910.

No 2122.

No. 8, SPECIAL CALENDAR.

THE UNITED STATES ON THE RELATION OF FRANCIS M. WALCOTT, APPELLANT,

vs.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 1, 1910.

In the Court of Appeals of the District of Columbia.

No. 2122.

THE UNITED STATES on the Relation of FRANCIS M. WALCOTT, Appellant,

vs.

RICHARD A. BALLINGER, Secretary of the Interior.

---

a Supreme Court of the District of Columbia.

At Law. No. 51864.

THE UNITED STATES on the Relation of FRANCIS M. WALCOTT, Plaintiff,

vs.

RICHARD A. BALLINGER, Secretary of the Interior, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition.*

Filed August 10, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51864.

THE UNITED STATES on the Relation of FRANCIS M. WALCOTT, Plaintiff,

vs.

RICHARD A. BALLINGER, Secretary of the Interior, Defendant.

Your relator, Francis M. Walcott, respectfully shows unto the Court as follows:

1. That he is a citizen of the United States, and a resident of the County of Cherry and State of Nebraska.

2. That Section 2306 of the Revised Statutes of the United States provides as follows:

"Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead, who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres."

The right of additional homestead entry so granted is personal property and is salable and assignable as such by the beneficiaries.

3. That one Shadrach Duer was entitled, under said section, to an additional homestead right of eighty acres, and on the
2 13th day of May, 1875, he sold and assigned the same by executing and delivering (but leaving blank the description of land) an application to make additional entry and an irrevocable power of attorney authorizing and empowering one Charles D. Gilmore to sell and convey the land to be entered as his additional homestead under said section, which power of sale and conveyance was then the means of transfer and the evidence of sale and purchase of such rights (the Land Department at that time holding that such rights were not directly assignable), and by said power said Duer divested himself in toto of all his rights under said section. Copies of said application and power of attorney, and of an affidavit of proof executed by said Duer to accompany them, are hereto attached, marked "Exhibit A," and prayed to be considered a part hereof.

4. That thereafter, to-wit, on September 20, 1875, said Duer, notwithstanding the sale as set forth in the preceding paragraph, wrongfully and unlawfully applied, at the U. S. Land Office at Ironton, Missouri, to make a personal additional entry of forty acres under said section 2306 R. S., which said application was granted by the Land Department without knowledge of the prior sale by Duer of his additional homestead right as set forth in the preceding paragraph.

5. That thereafter, to-wit, on October 7, 1875, one N. P. Chipman, then a partner of the aforesaid Charles D. Gilmore, having first inserted in the additional homestead application of said Duer described in paragraph 3 a description of the land to be entered, filed the same, together with the affidavit of proof, in the U. S. Land Office
3 at Sacramento, California, and homestead entry No. 1326 was allowed thereon for Lot 1 of N. W. ¼ of Section 4 Township 16 North, Range 17 East, containing 80 acres; and thereafter, on September 13, 1876, the Land Department erroneously held said entry for cancellation in its entirety, holding that the forty acre personal additional entry made by Duer in Missouri exhausted Duer's entire right under said section 2306 R. S., and the entry was accordingly cancelled. A copy of said decision is hereto attached, marked "Exhibit B" and prayed to be considered a part hereof.

6. That thereafter, to-wit, on June 16, 1880, Congress passed an Act (21 Stat. 287) providing for the repayment of fees, commissions and excess payments paid on cancelled invalid entries under said section 2306 R. S. in the first section thereof, and in the fourth

section directing the Land Department to make and issue rules and regulations to carry the Act into effect. In accordance with this authority the following regulation, which had the force and effect of law, was adopted:

"Applications for repayment under this section (1st) must be accompanied by the duplicate receipt, or evidence of the loss of the same, and by a concise statement under oath setting forth all the facts and circumstances connected with the procurement and use of the fraudulent papers upon which the cancelled entries were based, together with such documentary or other proof as may tend to establish the innocence of the parties relative thereto."

That on February 26, 1882, said N. P. Chipman, who by decree of this Honorable Court passed in Equity cause No. 6150 dissolving the partnership of which both he and said Charles D. Gilmore were members, which proceedings and decree are hereby referred
4 to and made a part hereof, had become sole owner of the Shadrach Duer additional homestead right and all interests acquired by the location thereof, made application under this Act for repayment of the fees and commissions paid on said Sacramento entry No. 1326, and in accordance with the said regulation above quoted filed in the Land Department his affidavit setting forth all facts connected with his "procurement and use" of the Duer additional right, making oath that he had purchased the same in good faith for a valuable consideration. The showing set forth in this affidavit was found by the Land Department to be satisfactory and on December 12, 1882, the Secretary of the Interior directed the fees and commissions paid on said entry to be refunded to said Chipman, the said affidavit being retained by the Land Department. A copy thereof is hereto attached, marked "Exhibit C" and prayed to be considered a part hereof.

7. That thereafter, to-wit, on January 5, 1907, the Land Department having held to be erroneous its rulings of twenty-five years' standing that additional homestead rights were not assignable and that one additional entry for less than the beneficiary was entitled to exhausted the right, said N. P. Chipman duly assigned the additional homestead right of said Shadrach Duer and relator became the owner thereof by mesne assignment in good faith for a valuable consideration, and on April 3, 1907, applied to enter therewith, at the U. S. Land Office at Valentine, Nebraska, the N. W. ¼ of S. W. ¼ of Section 8 and S. W. ¼ of S. W. ¼ of Section 10, Township 31 North, Range 36 West, which land was subject to such class of entry and free from every other claim or bar. That on April 21,
5 1909, relator relinquished his application as to said N. W. ¼ of S. W. ¼ of Section 8 and agreed to accept the said S. W. ¼ of S. W. ¼ of Section 10, containing forty acres, in full satisfaction of said additional homestead right.

8. That on October 26, 1908, the Commissioner of the General Land Office rejected the aforesaid application of relator as assignee of Shadrach Duer, for the sole and only reason that on September 7, 1901, said Duer had again assigned his said additional homestead right, this time for forty acres, to one John King, whose application

to enter land therewith had been allowed on July 14, 1903, the said Commissioner holding that the allowance of this King application completely satisfied the grant to Duer under said section 2306 R. S. This ruling was affirmed by the Secretary of the Interior on appeal, again on motion for review, and yet again on motion for exercise of supervisory authority, said last named decision being dated June 29, 1909, and a copy thereof is hereto attached, marked "Exhibit D" and prayed to be considered a part hereof.

9. That the application of said John King, set forth in the preceding paragraph, was granted without the knowledge or consent of the said N. P. Chipman, no attempt being made by the Land Department to notify him of said application or to give him an opportunity to be heard thereon, notwithstanding the affidavit filed by him as set forth in paragraph 6 and the admittedly genuine character of the papers filed by him with said Sacramento entry No. 1326, all of which were on file in the Land Department; and therefore the said application of John King was erroneously allowed, and the allowance of the same was not a due and lawful "satisfaction" of
6 the additional homestead right granted said Shadrach Duer by said section 2306 R. S.

10. Your relator further says that by said decision of June 29, 1909, the Secretary of the Interior has, without due process of law, unjustly, illegally and arbitrarily prevented him from entering the land applied for as hereinbefore set forth, and deprived him of the property right granted said Shadrach Duer by said section 2306 R. S. and duly transferred to relator in good faith for a valuable consideration, all to the irreparable loss, injury and damage of relator.

11. That your relator has performed all the acts necessary and prescribed by law and by the rules and regulations of the Land Department, and there is left to the Secretary of the Interior no other or further duty touching this subject matter except the purely ministerial duty of directing the allowance of relator's application as hereinbefore set forth; and that it is the plain, unqualified and peremptory duty of the said Secretary of the Interior, by virtue of his official position, to order the allowance of relator's application to make said entry, but that he has failed and refused, and still fails and refuses to do so, though repeated demands have been made upon him.

The premises considered, relator prays as follows:

First. That a subpœna may issue out of this Honorable Court to the respondent, Richard A. Ballinger, Secretary of the Interior, requiring him to appear and answer the exigencies of this petition.

Second. That a writ of mandamus may issue out of this
7 Honorable Court, directed to the respondent, and requiring him to allow relator, as assignee of Shadrach Duer, to make entry of the S. W. ¼ of S. W. ¼ of Section 10, Township 31 North, Range 36 West, Nebraska, under Section 2306 of the Revised Statutes of the United States.

FRANCIS M. WALCOTT.

F. W. McREYNOLDS,
Attorney for Relator.

I do solemnly swear that I have read the foregoing petition by me subscribed, and know the contents thereof; that the facts therein set forth upon my own knowledge are true, and those set forth upon information and belief, I believe to be true.

FRANCIS M. WALCOTT.

STATE OF NEBRASKA,
County of Cherry, ss:

Subscribed and sworn to before me this 26th day of July, 1909.
[SEAL.] A. M. MORRISSEY,
Notary Public.

My commission expires December 20, 1919.

8 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *August* 4, 1909.

51864.

I hereby certify that the annexed copies are true and literal exemplifications of the originals in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

9 EXHIBIT A.

M. L. 218,346.

Additional Entry under 2d Section, Act of June 8, 1872, *and the Act of March* 3, 1873.

Application.

No. 1326.

LAND OFFICE, SACRAMENTO, CAL., *Oct.* 7, 1875.

I, Shadrach Duer, of Phelps County, State of Missouri, being entitled to the benefits of the 2d section of the act of June 8, 1872, granting additional lands to soldiers and sailors who served in the war of the rebellion, do hereby apply to enter the Lot No. 1 of N. W. ¼ of Sec. 4 Tp. 16 N. R. 17 E. containing 80 acres as additional to my original homestead on the East ½ S. W. ¼ Section 17, in Township 37, of Range 6 W. 7, W, which I entered —— —, 18—, per homestead No. 816. Final receipt No. 224, dated Oct. 23, 1872.

Final proof made at Ironton Land office [Land Office],* on the 23d day of October, 1872. No. 224.

SHADRACH DUER.

Witness:
[SEAL.] L. F. PARKER.

[* Words enclosed in brackets erased in copy.]

LAND OFFICE, SACRAMENTO, CAL., *Oct.* 7, 1875.

10 I, T. B. McFarland Register of the Land Office at Sacramento, Cal., do hereby certify that Shadrack Duer filed the above application before me for the tract of land therein described, and that he has paid the fee and commissions prescribed by law.

T. B. McFARLAND, *Register.*

(Endorsed:) No. 1326. Additional Homestead, Sacramento, Cal. Oct. 7, 1875. Sec. 4, T. 16, N. R. 17 E. Shadrack Duer. Fees and Commissions ordered to be refunded. Decr. 18, 1882.

11 M. L. 218,346.

Additional Homestead.

(*Affidavit.*)

OFFICE AT ——,
——, 187-.

I, Shadrach Duer, of Phelps Co. Mo. having filed my application, No. ——, for an additional entry under the provisions of the second section of the act of June 8, 1872, as amended by the act of March 3, 1873, do solemnly swear that on the — day of ——, 18-, I made a homestead entry of 80 acres of public land at the U. S. Land Office at Ironton, per application No. 816 that I have faithfully complied with the requirements of the law in respect to said original Homestead No. 816; that the same is now in good and regular standing upon the records of the Land Office at Ironton; that I have never abandoned or relinquished an entry made under the provisions of the homestead laws, and that this additional entry is made for my own exclusive benefit, and not directly or indirectly for the benefit or use of any other person or persons whomsoever. And further, that I am prevented, by reason of distance and the expense attending, of appearing in person at the Local Land Office and making this sworn statement before the Register and Receiver there. Final proof, No. 224.

SHADRACH DUER.

12 Sworn and subscribed this 13th day of May, 1875, before
[SEAL.] L. F. PARKER,
Clerk Probate Court, Phelps Co., Mo.

M. L. 218,346. Wine.

Know all men by these presents, That we Shadrach Duer, and Sarah L. his wife have made, constituted and appointed, and by these presents do make, constitute, and appoint Charles D. Gilmore, of Washington, District of Columbia, my true and lawful attorney, for me, and in my name, place and stead, to locate and enter at the United States Land Office at Sacramento, in the State of California, my "additional homestead," under the provisions of the act of Congress, approved June 8, 1872, as amended by the act of Congress approved March 3d, 1873, being for the following described public land, to wit: Lot 1 of N. W. ¼ Sec. 4 Tp. 16 N. R. 17 E. M. D. M. and for me, in my name, or behalf, to enter into and upon the said

described premises, and take and hold possession thereof, with the appurtenances, with the same authority, powers, and rights, that I might or could do in person. Hereby giving and granting unto my said attorney full power and authority to grant, bargain, and sell the same, the said described premises, or any part or parcel thereof, or any interest therein, for such sum or prices, and on such terms as to him shall seem meet, and for me and in my name, to make, execute, acknowledge, and deliver good and sufficient deeds and con-
veyances for the same in fee simple, either with or without
13 covenants and warranty. Hereby covenanting to and with
my said attorney, his heirs or assigns, that I shall and will, at the request, and at the charge of such attorney or assigns, from time to time, and at all times hereafter, execute, acknowledge, and deliver, or cause to be executed, acknowledged and delivered, all and every such further and other acts, conveyances, and assurances in the law, for the better assuring to my said attorney, or his assigns, the said described premises, as by my said attorney, his assigns, his or their counsel, learned in the law, shall reasonably advise and require.

Giving and granting unto my said attorney full power and authority to appoint a substitute, or substitutes to perform any and all the intendments of these letters.

And in consideration of the sum of One hundred dollars, lawful money, to me in hand paid, by my said attorney, at and before the ensealing and delivery hereof, the receipt whereof is hereby acknowledged, this power of attorney is made irrevocable, and I do hereby release unto my said attorney all my claim to any of the proceeds of any sale, lease, or contract, that shall accrue by reason of the conveyance of the said premises. Hereby ratifying and confirming whatsoever my said attorney or his substitute may do in the premises by virtue hereof.

And I, Sarah L. Duer wife of the said Shadrach Duer do, by these presents, remise, release, and quit claim unto the said Charles D. Gilmore, my attorney aforesaid, and unto his assigns, all, and all
manner of dower and right and title of dower, and other in-
14 terest, right, or title whatsoever which I now have, or may,
might, should, or of right ought to have or claim, of, in to, or out of, the said above described premises, and every part or parcel thereof, with the appurtenances; Giving and granting unto the said Charles D. Gilmore, my attorney, full authority and right to transfer the same, by signing my name to such deeds or other conveyances, as by this power is contemplated, mentioned, or intended so to be, hereby ratifying and confirming whatsoever my said attorney or his substitute may do in the premises.

In witness whereof, I have hereto set my hand and seal this, the 13th day of May, A. D. 1875.

SHADRACH DUER. [SEAL.]
SARAH L. DUER. [SEAL.]

Signed, sealed and delivered in the presence of,
Attest here

M. J. WINE.
L. F. PARKER.

STATE OF MISSOURI,
County of Phelps, ss:

On this 13th day of May 1875, before me, L. F. Parker Clerk of the Probate Court in & for said County personally appeared Shadrach Duer and Sarah L. Duer his wife, personally known to me to be the individuals described in, and who executed the annexed instrument as parties thereto, and acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

And the said Sarah L. Duer wife of the said Shadrach Duer, having been by me first made acquainted with the contents of said instrument, acknowledged to me, on examination, apart from and without the hearing of the husband, that she executed the same freely and voluntarily, without fear or compulsion, or undue influence of the husband; and that she does not wish to retract the execution of the same.

In witness whereof, I have hereunto set my hand, and affixed my official seal in said county, the day and year in this certificate first above written.

[SEAL.] L. F. PARKER,
Clerk Probate Court, Phelps Co., Mo.

EXHIBIT B.

(Copy.)

M. L. 218,346.

C. DEPARTMENT OF THE INTERIOR, H. H.
GENERAL LAND OFFICE, E.
WASHINGTON, D. C., *September* 13*th*, 1876.

Address only the Commissioner of the General Land Office.

Register and Receiver, Sacramento, Cal.

GENTLEMEN: Additional Homestead Entry No. 1326 of Shadrach Duer, dated October 7, 1875, for Lot 7 of N. W. ¼ Sec. 4, T. 16 N., R. 17 E., is held for cancellation for the reason that the party had already exhausted his rights under Sec. 2306 R. S., the records of this office showing that he made Additional Homestead entry No. 4903, Certificate No. 1008, *Sep. 20, 1875,* at Ironton Land District, Mo.

You will notify the party of this action and advise him that he will be allowed 60 days from service of your notice in which to appeal to the Hon. Secretary of the Interior from this decision, and at the expiration of said period, you will advise this office of what action, if any, has been taken in the case.

Very respectfully, N. J. BAXTER,
Acting Commissioner.

17

EXHIBIT C.

51864.

To the Commissioner of the General Land Office:

I, N. P. Chipman of the Town of Red Bluff in the County of Tehama and State of California, hereby make application for repayment of the "Fees and Commissions and excess payments" paid by me on entry of the Lot 1 of N. W. ¼ of Section 4 Township 16 N. Range 17 E. M. D. M. as per Certificate No. 1326 issued at Sacramento bearing date the 7th day of October A. D. 1875, the same having been "found to be fraudulent and void, and the entry or location made thereon, cancelled."

And I further state that the said entry was made with an Additional Homestead Right in the name of Shadrack Duer, which was purchased of M. J. Wine, in due course of business, and was located by me as the owner thereof, acting under supposed authority purporting to have been duly executed and made by the said Shadrack Duer before L. F. Parker, Clerk Probate Court in and for the County of Phelps State of Missouri. That I was in no way knowing of any fraud or intention to defraud in the premises, but was, and am, wholly an innocent party in all things connected with, and done in said entry, and in and about the transactions concerning the same. That I actually paid the sum of Sixteen dollars and — cents as fees and commissions in said entry, and also paid as excess purchase money therein the sum of — dollars and — cents, in witness
18 whereof I herewith surrender and make due relinquishment thereof Receiver's Receipt No. 1326 and Receipt No. — issued as evidence of said payment and ask that repayment may be made to me of said sums by virtue of the provisions of the 1st Section of the Act of Congress approved June 16th 1880.

That I have not made another entry with the fees and commissions paid by me on said canceled entry.

N. P. CHIPMAN.

STATE OF CALIFORNIA,
County of Tehama, ss:

Personally came the above named N. P. Chipman, and subscribed to the foregoing in my presence and who being duly sworn according to law deposes and says that the facts and matters stated in the foregoing statement are just and true, And I certify that the said deponent is to me well known, and is the person he represents himself to be.

In Witness Whereof I have hereunto set my hand and affixed my notarial seal this 26th dav of February, 1881.

[SEAL.] CHAS. A. GARTER,
Notary Public.

(Endorsed:) No. —. Claim of N. P. Chipman, on Additional Homestead of Shadrack Duer. Claim for repayment of Fees and Commissions and excess payments.

19 EXHIBIT D.

Ext'd F. N. H. J. M. M. 7/2/09. E. F. B. 72537.

L. H. M., p. 107.

DEPARTMENT OF THE INTERIOR, E. F. B.
WASHINGTON, *June* 29, 1909.

Address only the Secretary of the Interior.

D-5876. J. W .C. M. L. 218,346.

FRANCIS M. WALCOTT, Assignee of Shadrach Duer.

Petition for Supervisory Authority Denied.

Received
Jun- 30, 1909,
G. L. O.

The Commissioner of the General Land Office.

SIR: This petition is filed by Francis M. Walcott for review of decision of the Department of January 23 and that of April 5, 1909, rejecting his application to enter the S. W./4 S. W./4, Sec. 10, T. 31 N., R. 36 W., Valentine, Nebraska, under the soldier's additional homestead right of Shadrach Duer.

September 14, 1867, Duer made homestead entry for eighty acres of land, for which he received patent February 1, 1873. By virtue of his military service he thereafter became entitled to a soldier's additional homestead right of eighty acres, under Section
20 2306, Revised Statutes.

May 13, 1875, he executed a power of attorney to Charles D. Gilmore, with power of substitution, authorizing his said attorney to locate his said additional homestead right with power to sell, and, in consideration of a payment by Gilmore to Duer of one hundred dollars, the power was made irrevocable, and the maker released to his said attorney all claim to the proceeds of the sale.

September 20, 1875, Duer, after the execution of said power, exercised his right of entry in person by the location of forty acres of land, for which he received patent December 1, 1875.

October 7, 1875, N. P. Chipman located said right in the name of and as attorney in fact for Shadrach Duer, having, it is presumed, been substituted as attorney in fact for Duer under the power and authority given to Gilmore.

At that time the soldier's additional homestead right was considered to be non-assignable, and could be exercised only by the soldier in person or by his duly qualified attorney, who could only make entry in the name of the soldier or his heirs and for their

benefit. It was also held at that time that the one exercise of the right exhausted it, whether the entry was made for the full quantity to which the soldier was entitled or not.

As the entry for the forty acres, made September 20, 1875, by Duer in person, was then considered to have been properly and legally exercised, and to have exhausted his entire right, the subsequent entry made by Chipman in the name of Duer was can-
21 celed, April 6, 1877, and after the passage of the act of June 16, 1880 (21 Stat., 287), authorizing repayment of certain fees, purchase money, and commissions, paid on void entries, Chipman filed his application for repayment of the fees and commissions paid upon said canceled entry, stating that he made said entry with an additional homestead right, "in the name of Shadrach Duer, which was purchased of M. J. Wine in due course of business, and was located by me as the owner thereof acting under supposed authority purporting to have been duly executed and made by the said Shadrach Duer."

Upon that application repayment of the fees and commission was made to Chipman, not in recognition of any title or interest in him to the additional homestead right, but because they had been paid by him with his own funds.

It was at that time understood by all parties to the transaction that the Department did not recognize any attempted sale of the right, and whatever may have been the character of the transaction as between the soldier and his attorney in fact, or their respective obligations to each other, it was well known to Chipman that if it had been represented to the Department that the right had been sold and that the entry was made for his benefit, it would not have been allowed. So that, whatever binding force may have been given to the stipulation making the power irrevocable, by Duer and his attorney, it was known that under the rulings of the Department the power could be revoked at any time, for the reason that it could only be exercised for the benefit and in the name of the beneficiary of the right named in the statute. (George A. Morris, 17 L. D., 512.)

22 Chipman being advised of the action of Duer in making entry in his own right after the alleged transfer thereof, the necessary effect of which was to revoke any previous powers as may have been executed with relation thereto, he was clearly bound to take such action as might be advised for purpose of protecting any claim he might have under said powers.

The application for return of fees and commissions made by Chipman, rather than furnishing notice of continued claim to Duer's additional right, was notice that all claim thereto was abandoned, surely as to the tract located, and reasonably as to any further claim on that account. His long inaction clearly suggested satisfaction or compromise.

Such was the recognized status of this right up to May 18, 1896, when the Supreme Court in the case of Webster *v.* Luther (163 U. S., 331) held that the right given by Section 2306, Revised Statutes, to make additional homestead entry, is a property right that

may be assigned under instruments similar to the power given to Gilmore, whereby the soldier's right and interest could be fully conveyed.

Under the Department rulings then in force, the soldier's additional homestead right, as before stated, was held to be exhausted when once used, although for a less quantity than sufficient to make up 160 acres. That continued to be the ruling of your office until February 12, 1898, when the Department, in the case of C. W. Darling (26 L. D., 192), held that under the ruling of the court in Webster *v.* Luther, the right was not exhausted until the full quantity had been entered.

23 No claim, however, was asserted under the right of Duer until December 14, 1901, when John King, holding under an assignment by Duer, executed September 7, 1901, of the outstanding portion of said right, applied to make entry thereunder, which was allowed by your office April 16, 1903. Final certificate was issued thereon July 18, 1903, and the entry was patented December 31st following. The right was then fully satisfied.

January 3, 1907, Chipman executed an instrument of writing, assigning to F. W. McReynolds the right to make entry of eighty acres of land under the soldier's additional homestead right of Shadrach Duer, alleging therein that in 1875 he purchased the entire right of Duer for a valuable consideration which was transferred by means of the power of attorney heretofore mentioned.

January 19, 1907, F. W. McReynolds assigned the eighty-acre right to Francis M. Walcott, who, April 13, 1907, filed his application to make entry under said right of eighty acres of land, but subsequently he filed a waiver of his right to forty acres, agreeing to accept title to the remaining forty acres in full satisfaction of the additional right of Duer.

In view of the fact that more than eleven years had elapsed after the decision of the court in Webster *v.* Luther, and nearly nine years after the decision of the Department in the case of Darling, before Chipman and his assignees asserted any claim to make entry under said right, it would seem that the Government is under no obligation, either legal or moral to compensate them for the loss

24 they may have sustained by the perfidy of others: But whether there is or is not, it is certain that the Department has no authority whatever to allow a duplication of entry for any part of said right.

It is not pretended that Chipman or his assignees had filed an application to make entry under the outstanding right of Duer, or had given notice of any claim to such right, after it had been ascertained that Duer's right had not been exhausted by his entry of the forty acres made in person in 1875, until the application in question was filed, and after the right had been fully satisfied.

Walcott's claim to recognition rests solely upon an application filed by Chipman in 1881 for the return of fees and commissions paid by him upon an entry made in the name of Duer under said right by Chipman as attorney in fact.

The only notice conveyed by that application was that Chipman's

entry had been made after Duer had revoked the power and exercised the right by making entry in person, and hence Chipman's entry was improperly allowed. It was canceled, and the fees and commissions were repaid to him because they had been paid by him with his own funds.

But although it was alleged that Chipman was the absolute owner of such right by purchase, it was a claim that was not then recognized by the Department, and your office was not bound by such notice, especially as to any right that might grow out of such claim twenty years thereafter.

The practical effect of the contention of petitioner is that
25 your office was chargeable with such notice of ownership for all time to come, and that by reason of such notice the Government would be precluded from allowing a valid location of such right by others holding under an assignment from Duer, and is bound to allow Chipman or his assignees to make entry for the full quantity of the additional homestead right of Duer, notwithstanding a quantity of land equal to the full area of that right has been entered and patented to Duer and his assignee.

If that contention is well founded, the entry of King as well as the entry made by Duer in 1875 is void. Independently of the statutory bar, a suit to vacate the patents issued upon such entry could not be maintained in face of the failure of Chipman to make any claim to said right after full knowledge of the act of Duer in 1875, or to assert his ownership of the right by applying to make entry under it within a reasonable time after it had been ascertained that a portion of the right is still outstanding.

Although no one should be allowed to make entry under a soldier's additional homestead right where the right to make entry thereunder is claimed adversely by another, whether under assignment, or otherwise, without giving notice to such adverse claimant, and although such notice doubtless would be given if the adverse claim is called to the attention of your office, the allowance of an entry without giving such notice would not render it void, nor could it be avoided after the issuance of patent, for the reason that the land department will not undertake to determine rights claimed under an alleged assignment of a soldier's additional homestead right
26 in the absence of an application to make entry thereunder. D. H. Talbot (on review), 30 L. D., 39. In that case it was said:

These transfers are not required to be noted in the records of the land department, and are not subject to the approval or supervision of its officers, nor can such officers, for the purpose of protecting the transferee against other prior or subsequent transfers by his transferrer, or for the purpose of enabling the transferee to more advantageously dispose of the additional right, stop other necessary work, every time such a right is claimed to have been transferred, and inquire whether the right has been theretofore exercised and exhausted, or whether the transfer is genuine and absolute. The duty of these officers will be performed if these matters receive proper attention

when an attempt is made to make entry of land under the additional right. Until then the transfer thereof does not concern them.

The petition is denied, and the papers are returned herewith.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

27 *Rule to Show Cause.*

Filed August 10, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51864.

THE UNITED STATES on the Relation of FRANCIS M. WALCOTT
vs.
RICHARD A. BALLINGER, Secretary of the Interior.

Upon consideration of the petition of Francis M. Walcott, it is, by the Court, this 10th day of August, 1909, adjudged, ordered and decreed that Richard A. Ballinger, Secretary of the Interior, be, and he hereby is, required to show cause on the 23d day of August, 1909, at 10 o'clock A. M., why a writ of mandamus should not issue directing him, as Secretary of the Interior, to allow said Francis M. Walcott, as assignee of the additional homestead right of Shadrach Duer, to make entry of the Southwest quarter of the Southwest quarter of Section 10, Township 31 North, Range 36 West, Valentine Land District, State of Nebraska, under Section 2306 of the Revised Statutes of the United States; provided that a copy of this order be served upon respondent on or before the 12th day of August, 1909.

By the Court:

ASHLEY M. GOULD, *Justice.*

28 *Marshal's Return.*

Served copy of within order on Richard A. Ballinger Secretary of the Interior by service on Jesse E. Wilson acting secretary of the Interior personally Aug. 10, 1909.

AULICK PALMER, *Marshal.*
H.

Answer.

Filed August 23, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51864.

THE UNITED STATES ex Rel. FRANCIS M. WALCOTT
v.
RICHARD A. BALLINGER, Secretary of the Interior.

Now comes the defendant, Richard A. Ballinger, Secretary of the Interior, and in answer to the rule to show cause why a mandamus

should not issue upon the petition of the United States on the relation of Francis M. Walcott, saith:

I. Respondent neither admits nor denies that relator is a citizen of the United States, having no information thereof.

29 II. He admits that the additional homestead right given by Section 2306 of the Revised Statutes is a property right, subject to sale and assignment.

III. He admits that the records of the General Land Office show that one Shadrach Duer, who was entitled to an additional right of entry for eighty acres under said Section 2306, Revised Statutes, executed an irrevocable power of attorney dated May 13, 1875, to Charles D. Gilmore, with power of substitution authorizing him to locate said additional right. He admits that Exhibit A is a true copy of said power, as appears from the records of the General Land Office, and no further answer is necessary as to the authority and right thereby conferred.

IV. Respondent admits that on September 20, 1875, Shadrach Duer exercised his soldier's additional homestead right by making entry in person of forty acres of land in the State of Missouri, which was patented to him December 1, 1875.

V. Respondent admits that on October 7, 1875, one N. P. Chipman made entry of eighty acres of land in the State of California based upon the soldier's additional homestead right of Shadrach Duer, and under said power of attorney. He admits that said entry was cancelled September 13, 1876, by the General Land Office

30 for the reason that the right had been previously exercised by Shadrach Duer and that his entire right was exhausted by the one entry.

VI. Respondent admits that said N. P. Chipman applied for repayment of the fees and commissions paid by him upon said entry, which application was allowed on December 12, 1882; that in and by said application for repayment to him of said fees, as aforesaid, he, the said N. P. Chipman, did assent to and acquiesce in the said ruling and determination that said entry was invalid, that the homestead rights of said Shadrach Duer had, at the time of the making of said entry by said N. P. Chipman, aforesaid, been completely exhausted and that said entry be canceled; that said N. P. Chipman did not, nor did any person for him or on his account, or as his successor in interest or as the successor in interest of said Shadrach Duer, appear in any manner or at all to object, nor was any objection whatsoever made, to the reception of said application of said Shadrach Duer or to the further and subsequent application of said John King, as assignee of Shadrach Duer, nor was any objection whatsoever made either by or on behalf of said N. P. Chipman or any successor in interest of said N. P. Chipman, to the allowance of said application of said King as assignee of said Shadrach Duer.

That said N. P. Chipman did not, nor did any person for him or on his account, either as his successor in interest or otherwise, at

31 any time between the cancellation of said entry of said N. P. Chipman on the 13th day of September, 1876, and the filing by the relator herein on the 3rd day of April, 1907, of an application

to enter certain lands as hereinafter and in the petition herein set forth, as the successor in interest by assignment from said N. P. Chipman of the unsatisfied additional homestead right of said Shadrach Duer, take any steps whatsoever inconsistent with the assent to and acquiescence in the cancellation of said application of said Chipman, as hereinbefore set forth, on the ground that the same was invalid and unauthorized.

Respondent avers that the application for and acceptance of the return of fees and commission and the abandonment of all claim to the land entered, as well as the failure to take any action looking to the revocation of the entry made by Shadrach Duer, or the cancellation of the patent issued thereon, was notice to the land department that the parties to said power of attorney recognized the right of Duer to revoke the same, and that it was revoked by his act in making entry in person, and that all claim to any right growing out of the same was forever abandoned and disclaimed.

VII. Respondent avers that on December 14, 1901, John King filed his application to make entry of forty acres of public land as owner of the remaining portion of the soldier's additional homestead right of Shadrach Duer under a written assignment of said right executed by Shadrach Duer September 7, 1901; that no other
32 application to enter under said right was then pending in the land department and the entry of John King was allowed July 18, 1903, upon which a patent was issued December 31, following, thus fully satisfying the entire soldier's additional homestead right of Shadrach Duer; that said action was affirmed by the Department as will appear from its decision of June 29, 1909, copy of which is attached to the petition of relator as Exhibit "D."

Respondent admits that on April 3, 1907, relator, claiming to be the owner of the unsatisfied additional homestead right of Shadrach Duer under assignment from N. P. Chipman, applied to make entry under said right of the N. W. ¼ S. W. ¼ of Section 8, and the S. W. ¼ S. W. ¼ of Section 10, township 31 north, range 36 west, which was subject to such class of entry and was free from claim or right. He admits that on April 21, 1909, relator relinquished his application as to the N. W. ¼ S. W. ¼ of Section 8, and agreed to accept the S. W. ¼ S. W. ¼ of Section 10, containing forty acres, in full satisfaction of said right.

VIII. That in and by said application of said N. P. Chipman for and the acceptance by him of the return of fees and commissions, as aforesaid, and in and by the failure to object to the entries of said Shadrach Duer and said John King, as hereinabove set forth, and in and by the failure of said N. P. Chipman or any other person for him or on his behalf or as his successor in interest, to take any steps whatsoever looking to an assertion of any rights or supposed rights held by him or them, under or by virtue of said power of
33 attorney from Shadrach Duer, to said N. P. Chipman, said N. P. Chipman did abandon and relinquish all claim to any rights whatsoever in or to the additional homestead right of said Shadrach Duer, either under or by virtue of the said power of attorney to him, the said N. P. Chipman, or otherwise, and that the

officers of the Department of the Interior of the United States did act upon the said application of the said John King, in reliance upon the said assent and acquiescence of the said N. P. Chipman and abandonment by him, as aforesaid.

IX. Respondent denies that relator had no notice of the application and entry of King or that he had no opportunity to be heard. On the contrary, he avers that said acts were notorious and were matters of public record of which relator was chargeable with notice. That neither relator nor his assignors took any steps to bring to the notice of the land department any claim to, or interest in said additional right until more than eleven years had elapsed after the decision of the Supreme Court in Webster v. Luther (163 U. S., 331), holding that the additional right given by Section 2306, Revised Statutes, is a property right subject to sale and assignment, and until nearly nine years after the decision of the Department in the case of C. W. Dowling (26 L. D., 198), holding that the right is not exhausted until the full quantity of land has been entered, and until nearly four years after the right had been fully satisfied. Respondent denies that he was chargeable with notice of owner-

34 ship of any part of said right by relator or his assignors at the time of the entry and patent to King; but on the contrary he avers that the only notice conveyed by the records of the land department was that the power given to Chipman in 1875 had been revoked, and that all right growing out of the same had been disclaimed by Chipman.

X. Respondent denies that relator has been illegally prevented from entering said land. On the contrary, respondent had no authority to allow the application of relator after the obligation of the Government had been satisfied by the issuance of patents for the full quantity of public land under said right. Respondent avers that if relator had any right growing out of the power of attorney given by Chipman in 1875, after the entry by Duer, it was lost solely by the laches of himself and his assignor.

XI. Respondent denies that relator has performed any act that would require respondent to issue to him a patent for said land or to allow an entry as the basis of patent.

And, having fully answered all matters alleged in said petition, he prays that the rule may be discharged and the petition dismissed at the cost of the relator.

FRANK PIERCE,
Acting Secretary of the Interior.
OSCAR LAWLER,
Assistant Attorney General, Attorney for Defendant.

E. F. BEST,
Assistant Attorney, of Counsel for Defendant.

35 DISTRICT OF COLUMBIA,
City of Washington, ss:

Frank Pierce, being first duly sworn, says that he is Acting Secretary of the Interior; that he has read over the foregoing answer by him subscribed and knows the contents thereof; that the matters

and things set forth on his personal knowledge he knows to be true, and those set forth on information and belief, he believes to be true.

FRANK PIERCE.

Subscribed and sworn to this 21st day of August, 1909.
Before me,
[SEAL.]

EDW'D B. FOX,
Notary Public in and for the District of Columbia.

Replication.

Filed November 9, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51864.

THE UNITED STATES ex Rel. FRANCIS M. WALCOTT
vs.
RICHARD A. BALLINGER, Secretary of the Interior.

The relator, Francis M. Walcott, replying to so much of paragraph IX of the answer and return of the respondent as sets
36 forth:

"Respondent denies that relator had no notice of the application and entry of King or that he had no opportunity to be heard. On the contrary he avers that said acts were notorious and were matters of public record of which relator was chargeable with notice."

Says that he denies that "said acts were notorious and were matters of public record of which relator was chargeable with notice."

II.

Relator further says that the remainder of said paragraph IX and all the other paragraphs of said answer and return of the respondent are bad in substance.

F. W. McREYNOLDS,
Attorney for Relator.

One of the matters of law intended to be argued on said demurrer is that the respondent is bound to take notice of the records of the Interior Department, and that when such records show the sale, by a beneficiary under Sec. 2306 of the Revised Statutes, of his additional homestead right, then the recognition by the respondent of a subsequent assignment of the same additional right by the same beneficiary to another party, without notice and without giving an opportunity to be heard to the prior purchaser, is not a "satisfaction" of the right granted by said Section 2306, if it be shown that the prior purchaser was a bona fide purchaser for value.

F. W. McREYNOLDS,
Attorney for Relator.

37 *Stipulation.*

Filed December 3, 1909.

In the Supreme Court of the District of Columbia.

At Law. 51864.

UNITED STATES ex Rel. FRANCIS M. WALCOTT
v.
RICHARD A. BALLINGER, Secretary of the Interior.

It is hereby stipulated by and between the relator and defendant by their respective counsel that the facts are:

1. It was the practice of the General Land Office prior to the twenty-second day of April, 1908, to keep an abstract of soldiers' additional homestead entries and applications, arranged in alphabetical order by the first two letters of the soldier's surname, showing, first, the name of the soldier; the number and date of his original entry; the land office where it was made; the description of the land by section, township, and range and its area; the land office and State where the application was filed; the description of the land applied for in the additional application by sub-division, section, township, and range; the name of the applicant and the letter number or file number, as the case may be, of said application.

When there are several additional applications or entries, all of
38 said applications were entered in said abstract of soldiers' additional entries in the same order and as nearly as possible, considering prior applications, in time, to the first additional applications.

It appears from said docket that the first additional entry under the right of Shadrack Duer was made at Iron, Missouri, for 40 acres; that the application of John King was made at Hailey, Idaho, on December 14, 1901, and was transmitted to this office under letter No. 200021 of 1901, and entered on said abstract after its receipt from the local office; that the application of Walcott was entered on said docket in 1907, under file No. 37854, immediately under said Hailey, Idaho, application of John King. There is nothing to show when or by whom said notations were made, but they were made by the clerk in the office having charge of such entries and with authority to enter them upon the said docket, and were entered within a short time after examination of the papers to ascertain whether the application was in due form.

Said docket or abstract book is not claimed by the General Land Office to contain either an absolutely complete or correct list of every application to make soldier's additional homestead entry that has been filed since said docket has been in use, which was some time shortly after February 13, 1883, and up to April 22, 1908, when the records were otherwise kept. But it was intended that it should and, if any additional entries have been omitted, it was by neglect or

inadvertence. It is not relied on wholly in determining whether or not an additional right has been exhausted. There is nothing to show when said docket was started.

39 It was the further practice of the office at that time to note opposite the original entry in the tract book where the same was, opposite and over the name of the entryman, either a memorandum of the land applied for or the letter number of each soldier's additional application, indicating that there was an application pending against said entry. Opposite Duer's original entry in the Ironton, Missouri, tract book is a memorandum in ink, "add'l in 4-16 N.-17 E., Sacramento, Cal. 1326, cancelled Apr. 6, 1877." The letter number of the application of said King, No. 200021 of 1901 was also noted on the same tract book after the receipt of the application from Hailey, Idaho. Said abstract and tract books were and are open to inspection by applicants and their attorneys and parties in interest in the cases upon proper application, and both are examined by the clerk in charge of the case in determining whether or not an additional right has been exhausted.

There is no record of any order from the Secretary of the Interior, the Commissioner of the General Land Office, or the chief of the division requiring the docket to be kept, nor is there any requirement of law that it be kept, but the Commissioner of the General Land Office has authority conferred upon him by statute to make all needful rules and regulations for the proper disposal of the public lands.

2. It is also agreed by the parties hereto as a matter of fact that the repayment of the fees and commissions made to N. B. Chipman in the Duer additional entry No. 1326, made at Sacramento, California, was, about the time of said repayment, noted on the

40 California tract book containing the land covered by said entry, and also stamped in red ink on the outside of said Susanville additional papers as follows:

Fee and commissions ordered to be refunded Dec. 18, 1882. Report. No. 38416.

W. GRIFFIN.

3. It is further stipulated and agreed that the demurrer filed herein by the relator and the question raised by the traverse of paragraph 9 of the answer upon the foregoing agreed statement of facts shall be argued and submitted to the court at the same time.

F. W. McREYNOLDS,
Att'y for Relator.
E. F. BEST,
OSCAR LAWLER,
Att'ys for Defendant.

Supreme Court of the District of Columbia.

FRIDAY, *January* 14, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 51864.

THE UNITED STATES on the Relation of FRANCIS M. WALCOTT, Petitioner,

vs.

RICHARD A. BALLINGER, Secretary of the Interior, Respondent.

41 Upon consideration of the petitioner's demurrer to the respondent's answer to the rule to show cause herein, it is ordered that said demurrer be, and it is hereby overruled; whereupon, the petitioner now in open Court says he will stand upon his demurrer, it is ordered that judgment on said demurrer be entered.

Therefore it is considered that the rule to show cause herein be, and the same is hereby discharged, the petition dismissed, and that the respondent recover against the petitioner, the costs of his defense, to be taxed by the Clerk, and have execution thereof.

From the foregoing, the petitioner by his Attorney in open Court notes an appeal to the Court of Appeals of the District of Columbia, and, upon motion, the penalty of the bond for costs on said appeal is hereby fixed in the sum of one hundred dollars ($100) or, in lieu thereof, a deposit of Fifty dollars ($50).

Memorandum.

January 24, 1910.—$50 deposited in lieu of appeal bond.

42 *Directions to Clerk for Preparation of Transcript of Record.*

Filed January 24, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 51864.

U. S. ex Rel. FRANCIS M. WALCOTT

vs.

RICHARD A. BALLINGER, Secretary of the Interior.

The Clerk of said Court will include the following proceedings in the record on appeal in the above cause, to wit: Petition and Exhibits, Rule to Show Cause, Answer, Traverse & Demurrer, Stipulation, Judgment, Memorandum of appeal bond, this designation.

F. W. McREYNOLDS,
Attorney for Relator.
F. W. CLEMENTS,
Att'y for Respondent.

43 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 42, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51864 at Law, wherein The United States, on the relation of Francis M. Walcott is Plaintiff and Richard A. Ballinger, Secretary of the Interior is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 11th day of February, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2122. The United States on the relation of Francis M. Walcott, appellant, vs. Richard A. Ballinger, Secretary of the Interior. Court of Appeals, District of Columbia. Filed Feb. 15, 1910. Henry W. Hodges, clerk.

IN THE

Court of Appeals, District of Columbia

APRIL TERM, 1910.

THE UNITED STATES, *ex rel.*,
FRANCIS M. WALCOTT, *Appellant*,
vs.
RICHARD A. BALLINGER,
Secretary of the Interior.
} No. 2122.

BRIEF FOR APPELLANT.

CHARLES A. KEIGWIN,
F. W. McREYNOLDS,
Attorneys for Relator.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Court of Appeals, District of Columbia

APRIL TERM, 1910.

THE UNITED STATES, *ex rel.*,
FRANCIS M. WALCOTT, *Appellant*,
vs.
RICHARD A. BALLINGER,
Secretary of the Interior.
} No. 2122.

BRIEF FOR APPELLANT.

STATEMENT.

In the year 1872 one Shadrach Duer, having theretofore served as a soldier in the army of the United States, made an entry under the homestead law, at the United States land office at Ironton, Missouri, the entry covering 80 acres of the public land.

By section 2304, Revised Statutes of the United States, certain rights of entry under the homestead law are conferred upon those who have performed certain military service for the Federal Government.

By section 2306, Revised Statutes of the United States, enacted in 1874, it is provided that:

> "Every person entitled, under the provisions of section 2304, to enter a homestead, who may have here-

tofore entered, under the homestead laws, a quantity of land less than 160 acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed 160 acres."

In virtue of this provision Duer was entitled to make an entry, of the kind called soldiers' additional entries, to the amount of 80 acres additional to the area of his original entry made in 1872.

On May 13, 1875, Duer bargained and assigned his right to make such additional entry to one Gilmore. At that time the statute above quoted was construed by the Land Department as granting to the soldier a merely personal right, which could not be assigned; and such remained the executive construction of the statute until the year 1896, when a contrary holding was announced by the Supreme Court of the United States in the case of Webster vs. Luther, 163 U. S., 331.

Accordingly, Duer's assignment of his right to Gilmore was effected by Duer's execution of an application to make an entry of 80 acres under the homestead law, the description of the land to be entered being left blank, and the delivery of this incomplete application to Gilmore, together with a power of attorney, by its terms irrevocable, authorizing Gilmore to "locate and enter," on behalf of Duer, the land, and to dispose of the same in fee simple (pp. 5, 6).

In September, 1875, Duer, in disregard of his assignment to Gilmore, made an additional entry at Ironton, Missouri, in his own name and for his own benefit, of 40 acres. This entry was admitted and was passed to patent by the General Land Office, there being then nothing on the records of that office to indicate Duer's prior asignment of his right.

In October, 1875, one Chipman, who had succeeded to Gilmore's rights as assignee of the Duer right of entry, made an entry of 80 acres at Sacramento, California, in Duer's name and in the purported exercise of Duer's right

of additional entry, using for that purpose the application and power of attorney given by Duer to Gilmore, the blanks in which were filled so as to designate the tract selected by Chipman.

Chipman's Sacramento entry coming to the General Land Office for final allowance, and the records of that office being examined with reference to the existence and extent of Duer's right of additional entry, it was perceived that Duer had previously made the Ironton entry. In accordance with an erroneous ruling, then prevailing, the Commissioner held that Duer's entry of 40 acres had exhausted his entire right, and by a letter of September 13, 1876, Chipman's entry at Sacramento was held for cancellation, being afterward in regular course actually canceled (pp. 8, 11).

The erroneous ruling, in pursuance of which Duer's whole right was held to have been exhausted by partial exercise, continued to be held at the Department of the Interior until February 12, 1898, when the then Secretary, upon the authority of Webster vs. Luther, *supra,* decided that the additional right of a soldier was not exhausted until the full quantity to which he was entitled had been entered: *In re* C. W. Darling, 26 L. D., 192; Record, p. 12.

In 1881, Mr. Chipman, accepting perforce the settled rule of the Department then in force, applied for repayment of the fees and commissions paid by him on account of the Sacramento entry. His application to that end, which was sworn to, set forth distinctly and fully the manner in which he had acquired the claim of Duer and fully apprised any person who read the paper of the fact that Duer had assigned his whole additional right (p. 9).

Duer's original entry, made in 1872, was recorded in the tract book kept at the General Land Office which contained all entries made at Ironton. It was the practice of the office to note opposite such original entries all applica-

tions for the exercise of additional rights based thereon, the purpose being, of course, to make and preserve such a record as would enable the Commissioner to determine to what extent the right of additional entry had been used.

Chipman's abortive effort to use Duer's right was, in pursuance of this practice, duly noted in the Ironton tract-book, the original entry of Duer being followed by this memorandum: "Addl. in 4-16 N., 17E., Sacramento, Cal., 1326, canceled April 6, 1877." The papers constituting Chipman's Sacramento entry were stamped with a note in red ink showing the refund of the fees and commissions paid thereon, with appropriate references leading to the history of the transaction (p. 20).

In February, 1883, some time after the repayment upon the Sacramento entry had been made, the General Land Office opened a docket intended to contain an abstract of all applications for the exercise of additional rights, the apparent purpose being to provide a safer and more convenient method of keeping such accounts with entrymen as might be necessary in respect of such rights (p. 19). The first additional entry of Duer, that made by himself for 40 acres in September, 1875, was noted in this book. But Chipman's canceled entry was not carried into the abstract (p. 19).

In September, 1901, Duer executed an assignment of his additional right to one John King. On December 14, 1901, King made an entry of 40 acres in pursuance of this assignment, which entry was passed to patent in December, 1903 (p. 12).

In 1907 Chipman assigned his rights under Duer's first assignment to F. W. McReynolds, who in turn transferred his title so acquired to Francis M. Walcott, the relator in this cause and the present appellant.

In the same year Walcott applied to make, at Valentine, Nebraska, an entry additional to the original entry of Duer.

The area at first applied for was 80 acres, but afterward this was reduced to 40 acres, which the applicant offers to accept in full satisfaction of his rights under the assignment to Gilmore.

The relator's application was rejected by the Commissioner upon the sole ground that Duer's additional right had been satisfied by Duer's entry of 40 acres and King's entry, as Duer's assignee, of 40 acres (p. 3). This action of the Commissioner was affirmed by the Secretary, who is present appellee, in three successive decisions, the last of which is included in the record (p. 10).

Thereupon Walcott, as relator, instituted this action for mandamus against the Secretary, the petition setting forth substantially the facts hereinabove stated.

The answer admits all the matters of fact alleged in the petition except that which is the subject of the following denial:

> "Respondent denies that relator had no notice of the application and entry of King or that he had no opportunity to be heard. On the contrary, he avers that said acts were notorious and were matters of public record of which relator was chargeable with notice. * * * Respondent denies that he was chargeable with notice of ownership of any part of said right by relator or his assignors at the time of the entry and patent to King; but on the contrary avers that the only notice conveyed by the records of the Land Department was that the power given to Chipman in 1875 had been revoked, and that all right growing out of the same had been disclaimed by Chipman" (p. 17).

On this denial issue was taken, and to the residue of the answer the petitioner demurred (p. 18). By stipulation the facts bearing upon the issue in fact were agreed, and the cause was heard upon the demurrer (pp. 19, 20, 21).

Judgment was rendered in favor of the defendant, from which judgment the present appeal is taken (p. 21).

ASSIGNMENT OF ERRORS.

It will be submitted that the Supreme Court of the District erred:

1st. In overruling the petitioner's demurrer to the answer;

2d. In dismissing the petition;

3d. In not awarding a peremptory writ of mandamus against the respondent.

ARGUMENT.

The jurisdiction to entertain this proceeding, and to grant a writ of mandamus if the answer of the respondent is insufficient in point of law, is well established upon the authority of this and of other courts.

> "This is not the case of one seeking to establish a title to lands as against the United States, but of one seeking to compel the performance of a ministerial duty imposed upon the officer by the terms of a statute. The duty, if such, does not cease to be ministerial because it requires in some degree the construction of the language of a statute."
>
> Ballinger vs. Ness, 33 App. D. C., 302.
> Roberts vs. United States, 13 App. D. C., 38.
> Roberts vs. United States, 176 U. S., 221.

Even in a case involving the exercise of discretion, and therefore not in itself a proper one for mandamus, if the responding officer has put his refusal to act upon some certain ground which is legally untenable, the writ will issue upon an adjudication that the refusal is erroneous.

Butterworth vs. Hoe, 112 U. S., 50.
West vs. Hitchcock, 19 App. D. C., 333.

In this case, the respondent, while admititng that the relator acquired a property right in virtue of Duer's original assignment, which under other circumstances the Depart-

ment would be bound to recognize, places his refusal now to recognize that right upon the ground that some one else has anticipated the relator in the assertion of the same right. This position is thus stated in paragraph IX of the answer:

> "Respondent denies that relator had no notice of the application and entry of King, or that he had no opportunity to be heard. On the contrary, he avers that said acts were notorious and were matters of public record, of which relator was chargeable with notice.
>
> "That neither relator nor his assignors took any steps to bring to the notice of the Land Department any claim to, or interest in, said additional right until more than eleven years had elapsed after the decision of the Supreme Court in Webster vs. Luther (163 U. S., 331), holding that the additional right given by Section 2306, Revised Statutes, is a property right subject to sale and assignment, and until nearly nine years after the decision of the Department in the case of C. W. Darling (26 L. D., 198), holding that the right is not exhausted until the full quantity of land has been entered, and until nearly four years after the right had been fully satisfied.
>
> "Respondent denies that he was chargeable with notice of the ownership of any part of said right by relator or his assignors at the time of the entry and patent to King; but, on the contrary, he avers that the only notice conveyed by the records of the Land Department was that the power given to Chipman in 1875 had been revoked, and that all right growing out of the same had been disclaimed by Chipman" (p. 17).

The final decision of the Department states in substance the same grounds for denying the title of the relator to make entry in satisfaction of the Duer additional right (p. 10), and it is averred in the petition (p. 3), and in effect admitted by the answer (p. 16), that the sole ground of the respondent's refusal to admit the relator's entry was that the Duer claim had been satisfied by the entry of King.

It is accordingly assumed that the only question now open to discussion is, whether the failure of the relator sooner to present his claim for the balance due on the Duer right operated as a waiver of his title in favor of a claim asserted upon a dishonest assertion of the same right in another.

The rule is, that—

> "Where a party gives a reason for his conduct and decision touching anything involved in controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another, and a different, consideration."
>
> Rwy. Co. vs. McCarthy, 96 U. S., 267.

The defense as stated rests upon these propositions:

That the relator had notice of the King entry;

That the Department had notice that the Chipman assignment had been revoked by Duer and disclaimed by Chipman; and

That the relator's delay in asserting his right constituted such laches as would bar his title in favor of King, the intervening entryman under a fraudulent transfer of Duer's right.

I.

The averment, as matter of fact, that the relator had notice of King's entry, is traversed by the replication, and the matters supposed to constitute such notice are agreed upon by the stipulation (pp. 18, 19).

The notice appears, upon an analysis of the stipulated matter, to consist in the mere fact that the King entry was made and duly noted in accordance with the methods of notation at the time obtaining in the General Land Office.

An abstract, or docket, of soldiers' additional entries, was opened in that office in 1883, some time after Chipman's Sacramento entry had been made and canceled, and repayment made on account thereof. In this docket, King's entry was noted, shortly after its making in 1901.

There is the further fact, if it be material, that a notation was made about the same time, opposite the original Duer entry in the Ironton tract-book, and referring to the letter by which the King entry had been forwarded to the Commissioner. These notes embody all that there was of record that was notice to anybody. And, taken singly or collectively, they amount simply to the fact that King was allowed to make an entry, in the purported exercise of Duer's additional right, without any actual notice or any kind of intimation to Mr. Chipman or any one else interested under Duer's first assignment. And this, in the face of a prior notation, opposite the original Duer entry in the Ironton book, and admonishing any one who considered the question of Duer's additional right, that a prior assignment had been made and was unsatisfied.

The averment of notice on the part of Chipman, therefore, assumes the principle that the simple notation of an entry at the General Land Office is constructive notice of that fact to all the world. It proceeds upon the theory that every one who has a right to enter any public land must, at his peril, ascertain and take notice of any assertion adverse to his right which anybody, at any time, may see fit to note on any page of any one of the multitudinous tract-books of the General Land Office. If this be the rule, then it was Mr. Chipman's duty to keep an attorney, or such number of attorneys as might be requisite for that purpose, constantly engaged in scanning all the current returns at the General Land Office, lest on some day in the course of many years some forgery or fraudulent claim should be there lodged which might, by some official inad-

vertence, be accepted as a satisfaction of his own outstanding right. Or, taking the proposed requirement most lightly, Mr. Chipman was bound to keep daily watch upon the Ironton book which contained Duer's original entry, and upon the abstract of additional entries, and immediately apprise himself and the Commissioner of any unwarranted entry which at any time should be offered in the pretended exercise of Duer's additional right.

Manifestly, any such exaction in respect of these additional rights, which are conceded to be property, would destroy all their value and practically divest them of their quality as property. Nor is there any principle of law which so requires any one to maintain such continuous scrutiny of any public records, or imparts to such records the effect of constructive notice to all mankind.

Notice from a recorded deed is imputed only to after purchasers who come to deal with the property, and not until they do come to deal with it, and only to purchasers from the same grantor.

Bates vs. Norcross, 14 Pickering, 224.
Doolittle vs. Cook, 75 Illinois, 354.
Townsend vs. Vanderwerker, 160 U. S., 171, 186.
Meley vs. Collins, 41 Calif., 663.

"The matter of constructive notice from the record is entirely a creation of statute, and no record will operate to give constructive notice unless such effect has been given to it by some statutory provision."
24 Am. & Eng. Encycl. Law (2d Ed.), p. 144.
29 Cyc., 1116.

If Chipman had any rights at all in the premises, those rights were independent of what some one else might or might not do in reference to his property. He was, therefore, under no duty to consult the current records in order

to forestall some possible unauthorized attempt to dispose of his property. If such an attempt should be made and should succeed, through error of the land officers or through fraudulent imposition upon them, the loss would properly fall upon the Government, and not upon Chipman, who was not obliged to inform himself of all that was demanded of the General Land Office by everybody.

Thus, where location had been made of a forged land warrant, and the person entitled to the genuine warrant applied for it, Mr. Attorney-General, afterwards Chief Justice Taney, advised:

> "An imposition practised upon the Department ought not to prejudice an innocent person who in no way contributed to the wrong done the public; and I think the son and heir of Moses Hawkins is entitled to a warrant for his bounty lands, notwithstanding a warrant and patent have been heretofore fraudulently obtained by another person for the same lands." (2 Op. Atty. Gen., 501.)

Mr. Attorney-General Reverdy Johnson, in a somewhat similar case of error on the part of the Government, advised:

> "The original liability of the United States for the claim * * * is conceded. The doubt is, whether its having been heretofore paid to persons who were not the heirs is, as against the latter, a bar. I think not. * * * It was, of course, not in the power of the accounting officers to defeat it by any act or mistake of theirs. The United States, by force of the act, were made the debtors, and were to continue such until discharged by payment to the actual creditors." (5 Op. Atty. Gen., 183.)

To the same effect is the case of

Benton's Exr. vs. Benton's Admr., 10 Leigh, 597.

II.

The records of the General Land Office showed that Chipman had, in 1875, attempted to exercise Duer's additional right by making at Sacramento an entry in pursuance of Duer's first assignment. Chipman's affidavit in support of his application for repayment on account of this entry showed that he had acted in that matter under an authority given by Duer in accordance with the practice then well known and understood at the Department as effecting an assignment of the soldier's right, and well known to have been made so effective by means of irrevocable powers of attorney (p. 9).

The fact that Chipman had thus asserted his ownership of Duer's additional right was recorded by a note upon the Ironton tract-book opposite Duer's original entry, with a reference to the Sacramento tract-book showing Chipman's entry. The Sacramento entry was followed by an annotation showing the fact of cancellation and repayment (p. 20).

The purpose of these annotations was to fix the status of Duer's additional right, to apprise the office of the extent to which that right had been used, and to serve as a check upon excessive allowance on account of that right. These minutes posted against the original entries when additional entries were offered, and the abstract of additional entries opened in 1883, were the established means of computing the balances due upon soldiers' entries, "and both are examined by the clerk in charge of the case in determining whether or not an additional right has been exhausted" (p. 20).

In the face of these facts it is clear that the General Land Office had actual notice and that, in the absence of gross negligence and departure from usual practice, it had actual knowledge of Chipman's interest when the King en-

try was allowed in 1901. Indeed the respondent does not deny the sufficiency of these facts to constitute notice, nor does the answer even suggest that the Department did not, in 1901, actually know that Chipman had in 1875 been in possession of and entitled to Duer's right of additional entry.

All that the answer undertakes to set up is, that these facts did not amount to notice of Chipman's continued ownership as late as 1901, but warranted the respondent in assuming that Duer's power of attorney had been revoked and Chipman's title, though asserted in 1875, had been abandoned (p. 17).

If Chipman owned any title in 1875, it is hard to see why he, or some one claiming under him, did not own the same title in 1901, the records showing no exercise of the right concededly existent in 1875. It will scarcely be contended that such a right would expire by mere lapse of time, though the answer, by its suggestion of laches, seems to proceed upon some such theory. If the Department was chargeable in 1882 when repayment was made, with knowledge of Chipman's title, the office records to that effect were none the less admonatory because twenty-five years went by without alteration of the records.

The abandonment of this right by Chipman is predicated solely upon the fact that he requested and obtained repayment of the land office fees on account of his unsuccessful effort to exercise the right. The only effect of accepting repayment upon a canceled entry is to reimburse the entryman. Neither the entry itself nor the repayment exhausts the right of entry or otherwise affects the entryman's right to make a second entry in the assertion of the same claim or privilege. Nor does an application for repayment afford any evidence of the entryman's intention to waive his right or to abandon a

further prosecution thereof. The inference, if any be possible, would rather be that he desires the money for the sake of making a new and more effective entry. If the Department deduced from Mr. Chipman's request for repayment the conclusion that he intended an abandonment of his property, the Department was guilty of a flagrant *non sequitur*.

Revocation of the power of attorney, by which Duer's original assignment was made effective, is sought to be inferred solely from the fact that Duer, in 1901, made to King another assignment, in fraud of the assignment then shown by the official records to be still outstanding in favor of Chipman.

Duer's power of attorney, given to Gilmore in 1875, is on file in the General Land Office, and is reproduced on page 6 of the present record. It purports to proceed upon a valuable consideration (p. 7), and is in terms irrevocable. It is not a mere authority to make entry on behalf of the donor and in his name to sell the entered land. By express words, the holder of the power is authorized "to enter into and upon the said premises, and take and hold possession thereof" in the same manner and with the same "authority, powers and rights" that the donor would or might have. Still further, the donee is empowered to sell all or any part of the land to be entered, or any interest therein, "for such sum or prices, and on such terms as to him shall seem meet," and to give "good and sufficient deeds and conveyances for the same, in fee simple," which conveyances the donor binds himself to confirm by whatever further assurances may be found requisite. Finally, the donor releases to the attorney "all my claim to any of the proceeds of any sale, lease or contract that shall accrue by reason of the conveyance of the said premises" (p. 7). The instrument is under seal, and the wife of the donor joins with him after private examination by the attesting officer (p. 8).

This is a power palpably coupled with an interest in the property, and therefore irrevocable. Gilmore was not authorized merely to sell the land, accounting to Duer for the proceeds, and himself being compensated by a commission or other species of reward bearing some ascertained proportion to the selling price, as was the case in Taylor vs. Burns, 203 U. S., 120. On the contrary, he was to enter, possess and enjoy the property as his own, to sell it in fee simple as his own, in his own discretion, and upon his own terms, and to retain the entire selling price as his own, without division or accounting with Duer. If the estate created in the donee was not such estate as is created by an absolute sale and a conveyance in fee simple, it is difficult to see what other degree or character of proprietorship a vendee in fee simple could acquire.

"The general rule, therefore, is, that a letter of attorney may, at any time, be revoked by the party who makes it; and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modification.

"Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in its terms, or, if not so, is deemed irrevocable in law (*2* Esp. N. P. Rep., 565). Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will, yet if he binds himself, for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. * * *

"We hold it to be clear that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing.

"The words themselves would seem to import this meaning. A power coupled with an interest is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. * * *

"But, if the interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him by a conveyance in his own name. * * *

"This idea may be illustrated by examples of cases in which the law is clear, and which are incompatible with any other exposition of the term, 'power coupled with an interest.' If the word 'interest,' thus used, indicated a title to the proceeds of the sale, and not a title to the thing to be sold, then a power to A to sell for his own benefit would be a power coupled with an interest; but a power to A to sell for the benefit of B would be a naked power, which could be exercised only in the life of the person who gave it. Yet for this distinction no legal reason can be assigned * * * But every day's experience teaches us that the law is not as the case first put would suppose. We know that a power to A to sell for the benefit of B, engrafted upon an estate conveyed to A, may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest in the thing."

Hunt vs. Rousmaniere, 8 Wheaton, 174.

In cases arising under the land laws of Texas, in which expedients similar to that here appearing had been adopted for the purpose of evading statutory restraints upon the assignment of rights of entry, it is held that a power of attorney to sell land which the donor is entitled to enter but has not entered is "a contract and a sale of the right."

Cook vs. Lindsey, 57 Texas, 67.

"If such instrument * * * authorize the attorney to make conveyance * * * as soon as the title to the settler's land was procured, and gave power of substituting another attorney, waiving all laws that might affect its validity, and declaring that it should be irrevocable, it evidenced a contract of sale and not a mere power of sale."

Brown vs. Simpson, 67 Texas, 225.

The highest Federal authority is direct to the point that such instruments as that here shown are not merely powers of attorney, and so revocable, but conveyances of the donor's title, creating property rights in the donee.

Webster vs. Luther, 163 U. S., 331, the case in which the Supreme Court overruled the pre-existing doctrine of the Department on this question and established the power to transfer the right of additional entry, originated in the courts of Minnesota. The transaction was effected in precisely the manner followed in the present case, and by a power of attorney which was substantially, if not literally, identical in wording with Duer's power given to Gilmore. Of the instrument appearing in that case, the Supreme Court of Minnesota said:

"Robertson gave a power to act as her attorney to sell and convey the land she might obtain under her said right, and receive pay for it, and in the same instrument she assigned and released to Boggs the proceeds of any such sale. * * *

"Taking the instrument executed by Mary A. Robertson, the person entitled to the additional entry, to James A. Boggs, to have been intended to be, not merely a power of attorney, but also an assignment of the right to make the entry, so that the power to convey was irrevocable, the case presents directly the question, may such right be assigned so as to bind the parties?"

Webster vs. Luther, 50 Minn., 77.

This question the Supreme Court of the State answered in the affirmative, holding that Mrs. Robertson was bound by her power given to Boggs, and that a vendee holding under Boggs was entitled to the land as against a purchaser from Mrs. Robertson, who had assumed to dispose of the title in disregard of her assignment to Boggs.

In the Supreme Court of the United States the judgment of the Minnesota Court was affirmed, Mr. Justice Harlan quoting approvingly from the opinion of the State Court.

To like effect are:

Barnes vs. Poirier, 27 U. S., App., 500.
Mullen vs. Wine, 26 Fed. Rep., 206.
Knight vs. Leary, 54 Wisconsin, 459.
Rose vs. Nevada Co., 73 Calif., 385.
Montgomery vs. Pacific Coast Land Bureau, 94 Calif., 284.

These authorities establish the proposition that the right to make an additional entry is personal property, and as such may be, and actually is, conveyed by such a power of attorney as Duer gave to Gilmore in 1875. If, then, such an instrument is effective as a conveyance, it is not a mere power of attorney to make entry and to sell, and can not be revocable by any subsequent act of the grantor.

The Department itself, even at the time when it held that the right of additional entry was not transferable, recognized that such rights had become the subject of commerce and protected purchasers who have acquired interests under powers of attorney. By a Departmental circular, dated August 5, 1874, it was provided that a claimant of a right to make additional entry might make his location "through an attorney." (1 Copp's Land Laws, 279.) In a circular of May 17, 1876, the Department acted upon a report from the Commissioner to the effect that "the right to make such additional entries had become the subject of sale and trans-

fer, effected by two powers of attorney, one to make the entry, and the other to sell the land when located." (2 Copp's L. L., 486.)

The binding force of such transfers, executed under the guise of attorneyship, was also recognized by the Department, even when the practice was pronounced unwarranted by law. In the case of Patterson, 2 Copp's L. L., 205, the Secretary held that a power of attorney given by a claimant could not be revoked by a later power; and this ruling was approved and followed in the case of Barnes vs. Allison, 1 L. D., 34. In the case of James Brown, 2 L. D., 30, decided in 1883, a soldier qualified to make an additional entry had given to one Thomas a power of attorney which was in effect a transfer of the right; after which the soldier died and his widow undertook to give a new power to another person; and Secretary Teller ruled:

> "The power of attorney was coupled with an interest, and said Elizabeth Brown joined in its execution. * * *
>
> "It is claimed by counsel for Mrs. Brown that the husband died without a legal exercise of his statutory privilege, and that the right, being a personal one. died with him.
>
> "Under the facts stated, I approve your ruling, that the attorney Thomas is entitled to the possession of the certificate."

The practice of transferring such rights by powers of attorney is recognized by the Department in these, among other, cases:

Joshua Farmer, 2 L. D., 31.
William French, 2 L. D., 235.
Lars Winquist, 4 L. D., 323.
Oliver vs. Thomas, 5 L. D., 289.
Wachter vs. Sutherland, 7 L. D., 165.

In Cleveland vs. North, 16 L. D., 484, it was said:

"A copy of the power under which this sale was made has been filed, and it shows that it was executed June 20, 1877, and was, in effect, an absolute sale of the additional right; for, in consideration of $100, it was made irrevocable, and the party in whose favor the power was executed was authorized to receive for his own use and benefit any money or other property arising from the sale, and the right of the entryman to any such proceeds or property was specifically released. * * *

"There can be no question but that the power under which this sale was made was an absolute sale of the additional right."

In George A. Morris, 17 L. D., 512, it was said:

"The alleged power of attorney executed by Morris and wife to Walker was an absolute sale of the additional right. * * *

"The entry in question was not made under a *bona fide* power of attorney, but under an instrument conveying the soldier's additional right to the alleged attorney in fact."

In Henry Walker, 25 L. D., 119, it was said:

"It appears from the foregoing recital that, on March 5, 1879, Walker sold his right to make soldier's additional entry to M. J. Wine, by means of two powers of attorney, one to locate, and the other to sell the land located and appropriate the proceeds to his own use, the powers being coupled with an interest, therefore irrevocable. * * *

"It will be conceded * * * in view of the recent case of Webster vs. Luther, that M. J. Wine did, on March 5, 1879, become the legal assignee of said right."

"It appearing that the additional homestead right of Hughart was duly assigned by him to Tuttle, and through the latter to Stegmiller (by substituting him as attorney), it can no longer be questioned that the power of attorney given by Hughart * * * was a power coupled with an interest (in fact the sole beneficial interest), in the right to make the additional entry."

Mee vs. Hughart, 28 L. D., 209.

III.

The ground of defense really intended to be set up by the answer appears to be the supposed laches of the relator and those under whom he claims.

The suggestion of this as an additional defense seems to indicate that the respondent had little confidence in his other two grounds: that Chipman had notice of King's application, and that the Department had notice of Chipman's abandonment of his right under Duer's original assignment. If either of these suggestions could be established, and its materiality demonstrated, the proof of laches on the part of Chipman would be not only superfluous but in some degree inconsistent with the defense on other grounds.

Chipman's laches, and the laches of those claiming under him, are immaterial in any aspect of the case, if the doctrine of the cases cited to the last point of this argument is accepted. The decisions which have been stated, both judicial and departmental, concur in holding that the right to make additional entry is property, that as property and as a legitimate subject of commerce it may be sold and conveyed, and that the purchaser takes a legal title to the right purchased just as the vendee takes a legal title to a horse or a watch which he buys of a dealer.

In Mullen vs. Wine, 26 Fed. Rep., 206, the late Mr. Justice Brewer, speaking of the sale of one of these rights

of additional entry, by means of powers of attorney similar to those used by Duer, said:

> "There are really but two questions in the, case: First, was this right to locate and enter personal property? Second, was it assignable? For, that the guardian could, under the laws of Minnesota, without any order of the Court, sell personal property belonging to the ward, is conceded. That he did sell this right, and did receive the stipulated price, is beyond doubt. If the title once passed from the minors to Talbot, that is the end of the matter.
>
> "Now this right to enter * * * was a thing of value * * * was property. It was personal property, going with them where they went, could be exercised and enjoyed anywhere, did not descend to the heir, was not attached to any particular tract of land, was therefore neither permanent, fixed nor immovable. Like all property, it was subject to sale. The right to sell property need not in terms be granted; it exists if it is not in terms withheld. It amounts simply to this, in view of what has been done Congress makes this gift. * * * Why may he not sell it? I see no reason to the contrary."

If, by Duer's assignment in 1875, a sale of personal property was effected, then neither lapse of time nor laches could affect the accomplished transaction. The vendee's delay in the use of his property would not impair his title, nor would it reinvest Duer with what he had sold by a valid sale and for a valuable consideration.

The law puts no limitation upon the time within which the right of additional entry may be exercised. The soldier may defer his claim until the extreme of old age; after his death the entry may be made by his widow; after her death, by his heirs; or, in case of a sale, the vendee may await his own good time and consult his opportunities before reducing his right to a concrete entry. To infer from Chip-

man's delay in exercising his right of entry that he had waived or compromised that right would be as reasonable as to say that a man had abandoned his right to make original homestead entry by waiting until the age of seventy-five years before offering to enter.

Nor is laches available as a defense at law in any case; and this is a legal action involving a strictly legal right. If delay, or the consequences of delay, could be made material in this case, it could be only by finding some statutory limitation, which does not exist, or by inventing one to meet the supposed exigencies of the situation, which would be sheer judicial legislation. What is said in the answer by way of suggesting that the relator has in some way prejudiced his right by procrastination, may, therefore, properly be laid out of the case.

Independently, however, of any technical difficulties in entertaining the defense of laches, it is clear that there are no facts here to make that defense.

Laches, as has often and with much stress been insisted by the courts, does not consist in mere delay. The lapse of time will not, of itself, constitute laches, as witness numerous cases in which courts have afforded relief after periods compared with which the nine years and the twelve years mentioned in the appellee's answer are but as childhood to old age.

McGee vs. Welch, 18 App. D. C., 177.
Speidel vs. Henrici, 120 U. S., 377.
Beaubien vs. Beaubien, 23 How., 190.
United States vs. Moore, 12 How., 209.
Moore vs. Greene, 19 How., 69.

"It has been repeatedly said that the application of the doctrine of laches depends on the circumstances of each particular case; and, whilst in the abstract this is true, it is apt to be misleading if the constituent and essential elements, which go to make up laches, in the

> technical sense of the term, are overlooked or disregarded. Strictly speaking, and using the term as it is understood in the law, laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. * * * Mere lapse of time, without more, unless sufficient to amount to and constitute the bar of the statute of limitations, will not be sufficient."
>
> Demuth vs. Old Town Bank, 85 Md., 326.

The only possible element of laches, other than mere lapse of time, which is or can be suggested in this case is the fact that, through the inaction of the relator and his predecessors in title, the General Land Office erroneously accepted the entry of King in satisfaction of the Duer additional right.

The lapse of time, upon which the answer lays so much stress, is clearly not accountable for this error of the land officers, or even as affording Duer and King an opportunity to impose upon the Department by a false show of right to enter. For that kind of a fraud twelve months, or twelve days, would answer as well as twelve years. It would have been as easy for Duer to give a second assignment of his right in twelve hours as in twelve years after his assignment to Gilmore; and he would have been as likely to do so in the shorter period as in the longer if the suggestion and the opportunity had occurred to him. To guard against that sort of dishonesty, the first purchaser of the title must make his entry immediately; and even in doing that he would run the risk of being anticipated by the accident of an earlier mail, if the question of title is to turn upon the matter of mere priority in the assertion of title or upon the reasonableness of delay in making entry.

Again, to say that the relator's delay misled the land officers, by causing them to suppose the right of Chipman to be abandoned, is not supporting the defense of laches but

merely insisting that a false and unwarranted inference was drawn from the delay. If, as the foregoing argument has sought to show, the land officers put an erroneous construction upon the postponement of the relator's right, the delay was immaterial. If those officers were justified in awarding the right to King, it must be because insufficient notice of Chipman's title was given to the Department; but that is something essentially different from laches. If the relator's right is held to be barred, it is not because he has been guilty of delay in the exercise of that right, but because he had not duly notified the Department that the right existed.

The insufficiency of the notice filed by Chipman, if any such insufficiency could be pretended, is not set up in the answer as ground for refusing the relator's application. On the contrary, the answer by clear implication admits that the Department was sufficiently advised of Duer's assignment to Chipman; and there is no suggestion that that fact was not actually known to the land officers in 1901 when King's entry was accepted, as indeed the Chipman title must have been actually noticed if the records were examined in accordance with the practice stated in the stipulation. The adequacy of the notice is, therefore, not now open to question; and the only question possible is, whether the land officers, in view of actual notice of the Chipman title, were warranted in permitting his right to be satisfied by the entry of another person. On this point the declarations of the Department itself are strongly against the position now taken on its behalf.

In the case of Henry Walker, 25 L. D., 119, Walker had sold his additional right to one M. J. Wine, by just such powers of attorney as appear in the present case. Before Wine had made an entry under these powers, or otherwise advised the Department of his interest, Walker's widow made an entry in the asserted exercise of his right. In acting upon this state of facts, the Secretary said:

"It will be conceded, upon the showing made, and in view of the authority of the recent case of Webster vs. Luther, 163 U. S., 331, that M. J. Wine, the present applicant, did on March 5, 1879, purchase from Walker his right of additional entry, and that he thereby became the legal assignee of said right."

"It may be further conceded that, if Wine had made known to the Government the fact of his said purchase, and had asserted his rights against the Government as such purchaser and assignee, before the entry by Walker's widow had been allowed, as stated, it could not now be held that said entry made by the widow, in any way affected the rights acquired by him under his said purchase and assignment."

"The claim of an alleged assignee of a soldier's additional homestead right can not be recognized, where the soldier has in person exercised the right, if it is not clearly shown that the soldier, before making said entry, had in fact assigned his additional right, and that the Government was charged with notice of such assignment prior to the allowance of the said entry."

Edward O'Keefe, 27 L. D., 565.

"The fact that your [the Commissioner's] office, overlooking the pending application by Dierks, erroneously permitted Frazier to acquire title to 160 acres under the homestead law, is not sufficient reason for rejecting said application. The Land Department was fully apprised of the sale of the additional right by Frazier prior to the patenting of his homestead entry as amended. It is therefore directed that, if Dierks' application is otherwise regular and proper, the same be accepted."

Herman Dierks, 33 L. D., 362.

It is accordingly submitted that the judgment appealed from should be reversed, with direction to the trial Court to issue a writ of peremptory mandamus in accordance with the prayer of the petition.

CHARLES A. KEIGWIN,
F. W. McREYNOLDS,
Attorneys for Relator.

In the Court of Appeals, District of Columbia.

APRIL TERM, 1910.

No. 2122.

No. 8, Special Calendar.

UNITED STATES OF AMERICA EX REL FRANCIS M. WALCOTT,
APPELLANT,

v.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

OSCAR LAWLER,
Assistant Attorney-General.
F. W. CLEMENTS,
First Assistant Attorney.
S. W. WILLIAMS,
Assistant Attorney, Interior Department.

In the Court of Appeals of the District of Columbia.

APRIL TERM, 1910.

THE UNITED STATES ON THE RELATION of Francis M. Walcott, appellant, *v.* RICHARD A. BALLINGER, SECRETARY OF the Interior. } No. 2122. No. 8, Special Calendar.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The relator, alleging that he was assignee of Shadrach Duer, petitioned the Supreme Court of the District of Columbia for writ of mandamus, directing the Secretary of the Interior to allow him to make soldiers' additional entry of the SW. ¼ of the SW. ¼ of sec. 10, T. 31 N., R. 36 W., Valentine land district, State of Nebraska. The defendant made answer, demurrer to which was sustained, and, relator electing to stand upon his demurrer, judgment was entered discharging the rule to show cause and dismissing the petition: hence this appeal.

Shadrach Duer, an honorably discharged veteran of the civil war, was, on the 13th day of May, 1875, by reason of his military service and his having made homestead entry to the extent of 80 acres, entitled, under the provisions of section 2306 of the Revised Statutes of the United States, to make soldiers' additional homestead entry for 80 acres of public land. (Record, folio 2.)

37156—10

On said last-mentioned date he executed application to exercise such right for the full 80 acres of land, and delivered the same to Charles D. Gilmore (Record, folio 9, and Exhibit A, folio 9), at the same time executing and delivering to Gilmore power of attorney, with power of substitution and in terms irrevocable, authorizing the latter to locate such additional homestead right and to sell the land located, said power reciting a consideration of $100 and the release by Duer to his said attorney of all claim to the proceeds of the sale or other disposition of the land located. (Record, folios 12–14.)

On September 20, 1875, before any action was taken under or pursuant to said application executed by Duer on May 13, 1875, and delivered by him to Gilmore, as aforesaid, Duer exercised his right of entry in person by the location of 40 acres of land in the Ironton (Missouri) land district, for which he received patent December 1, 1875. (Record, folios 2 and 20.)

Under the construction then obtaining in the department such additional entry was held to exhaust the soldier entryman's right, notwithstanding it failed to cover land to the full extent of the difference between his original homestead (80 acres) and the 160 acres limited by section 2306. (Record, folios 3 and 16.)

October 7, 1875, N. P. Chipman filed the application executed by Duer on May 13, 1875, at the Sacramento land office, Chipman being then a partner of Gilmore and having inserted in said application the description of a tract of land containing 80 acres (it not being averred that said transaction was, or purported to be, anything other than an application *by Duer* (Record, folio 3). Pursuant to the then holding of the Interior Department, that one entry under a soldiers' additional right exhausted the privilege, this latter application was, on September 13, 1876, canceled (Record, folios 3 and 16), upon the ground that the applicant had theretofore exhausted his right by the entry made and allowed on September 20, 1875; the commissioner in his decision allowed sixty days in which to appeal therefrom (Record, folio 16), but nothing was done by Chipman or the successors to whatever rights may have existed in him or Gil-

more for almost thirty-one years; i. e., until April 3, 1907. (Record, folio 5.)

February 26, 1882, pursuant to the provisions of the act of June 16, 1880 (21 Stat., 287), authorizing repayment of fees, purchase money, and commissions paid on illegal and void entries, said Chipman filed application for and on December 12, 1882, received repayment of, the fees and commissions paid on account of said California entry which had been canceled as aforesaid (Record, folios 3, 4, and 17); in said application for repayment it was recited that Chipman had made the entry in the name of Shadrach Duer, having purchased the latter's right from one M. J. Wine, in due course of business, and had located the same as the owner thereof, acting under supposed authority which appeared to have been duly executed by said Duer. (Record, folio 17.)

May 18, 1896, it was decided, in the case of *Webster* v. *Luther* (163 U. S., 331) (contrary to the ruling and practice theretofore obtaining in the Interior Department), that the soldiers' additional right was assignable, and, on February 12, 1898, the Interior Department held (26 L. D., 122) that the right was not exhausted until the full quantity of land to which the soldier was entitled had been entered. (Record, folios 3, 12, 17.)

On September 7 1901, Duer assigned his unsatisfied additional right (amounting to 40 acres) to John King, and the latter, pursuant to application in that behalf, located the same upon 40 acres of land in the Haley (Idaho) land district, for which he received patent December 31, 1903. (Record, folios 3, 4, 12.)

From December 12, 1882, the date of the repayment to him of the fees and commissions paid on the canceled entry, as aforesaid, until April 3, 1907, neither Chipman nor any other person did anything whatever in the way of asserting or attempting to assert any rights under or pursuant to the transaction of May 13, 1875; on said April 3, 1907, the relator, Walcott, as then holder by mesne assignments from Chipman, applied at the United States land office, at Valentine, Nebr., to enter 80 acres of land, which application was, on *October 26, 1908*, rejected; on *April 21, 1909*, the applicant relinquished his application as to one-half of the land

described therein, and agreed to accept the balance in full satisfaction of the additional homestead right of Duer. (Record, folios 4, 5.) As just stated, the rejection *covered the application for 80 acres*, and the record shows no more than that this relinquishment and substitution last mentioned were attempted on April 21, 1909, after such rejection on October 26, 1908.

It thus appears by the complaint that Duer's additional homestead right, to the full extent of 80 acres allowed him by law, had been entirely exhausted long prior to April 3, 1907, when the relator attempted to make entry covering 80 acres, as heretofore stated.

Respondent answered, alleging that Chipman by nonaction, by applying for refund of fees and commissions, and by failing to object to the application of Duer in person or to the application of King as Duer's assignee, had assented to and acquiesced in the department's determination that the attempted application of October 7, 1875, was unauthorized and invalid (folios 29, 30); that neither Chipman nor any person for him or on his account or as his successor in interest, at any time between September 13, 1876, and April 3, 1907 (more than thirty years), took any steps inconsistent with assent to and acquiescence in such cancellation of said application as invalid and unauthorized (folios 30, 31); that the power of attorney to Gilmore was revoked by Duer's making application in person; that Chipman's application for return of fees and his failure to pursue the Duer entry were notice to the department of acquiescence in and recognition of the right of revocation, and that Chipman abandoned and disclaimed any rights under the power thus revoked (folio 31).

The answer admits the issuance of patent to King, covering 40 acres, applied for on December 14, 1901, as assignee of Duer, and alleges that no other application to enter under Duer's right was then pending, and that the issuance of such patent exhausted Duer's right (folios 31, 32).

The filing of the application by relator on April 3, 1907, for 80 acres (which was denied October 26, 1908), and the relinquishment on April 21, 1909 (after such denial), of part of the land covered thereby, and relator's agreement to accept the remainder in full satisfaction, is also admitted (folio 32).

It denies that Chipman had no notice of the application filed by John King in 1901; that the act of John King in making application to locate the right of Duer and the subsequent acts of the Interior Department allowing the same were notorious and matters of public record of which the relator was chargeable with notice; that neither the relator nor his assignor took any steps to bring to the notice of the land department any claim to or interest in said additional right until more than eleven years had elapsed after the Supreme Court of the United States had decided, in the case of *Webster* v. *Luther* (163 U. S., 331), the soldiers' additional right granted by section 2306 of the Revised Statutes to be a property right subject to sale and assignment, and not until nine years after the decision of the Interior Department in the case of C. W. Darling (26 L. D., 198), holding that the additional right is not exhausted until the full quantity of land had been entered (folios 33, 34).

Respondent further denied that he was chargeable with notice of ownership of any part of said right by the relator, or his assignor, at the time of the entry and patent to King; that, on the contrary, the only notice conveyed by the records of the Land Department was that the power of attorney executed by Duer in 1875, under which Chipman claimed, had been revoked, and that all right growing out of the same had been disclaimed by Chipman; and respondent averred that if the relator had any right growing out of the power of attorney executed by Chipman in 1875, after the entry made by Duer, such right was lost by the laches of himself and his assignor. (Record, folios 33, 34.)

The eighth paragraph of the answer is as follows:

> That in and by said application of N. P. Chipman for and the acceptance by him of the return of fees and commissions, as aforesaid, and in and by the failure to object to the entries of said Shadrach Duer and said John King, as hereinabove set forth, and in and by the failure of said N. P. Chipman or any other person for him or on his behalf or as his successor in interest, to take any steps whatsoever looking to an assertion of any rights or supposed rights held by him or them, under or by virtue of said power of attorney from Shadrach Duer, to said N. P. Chipman, said N. P. Chipman did abandon and relinquish all claim to any rights whatsoever in or to the

additional homestead right of said Shadrach Duer, either under or by virtue of the said power of attorney to him, the said N. P. Chipman, or otherwise, and that the officers of the Department of the Interior of the United States did act upon the said application of the said John King, in reliance upon the said assent and acquiescence of the said N. P. Chipman and abandonment by him, as aforesaid. (Record, folios 32, 33.)

The relator demurred generally to the answer and traversed the averment that the application and entry of King were notorious acts and matters of public record, of which the relator was chargeable with notice. (Record, folio 36.) Respondent contends—

First. That the power executed by Duer to Gilmore did not constitute a transfer of Duer's additional homestead right.

Second. That said power was confined to a particular tract, and that mandamus is not available to compel its application to another and different tract.

Third. That Duer had the power (at his own peril as to personal accountability) to violate the contract with Gilmore, which was succeeded to by Chipman, and this he did effectively and revoked the power by his personal location made September 20, 1875, and by the further location of King as assignee of Duer made July 14, 1903.

Fourth. That Chipman, by applying for and receiving on December 12, 1882, repayment of the fees and commissions paid to the Government on account of his attempted location of the 80 acres of land described in the power to Gilmore, acquiesced in and accepted as correct the ruling of the department, which he now claims to be erroneous.

Fifth. That Chipman's assent to the rejection of the attempted location on October 7, 1875, as unauthorized and invalid, the failure of plaintiff and his predecessors in interest for more than twenty years to assert any claim by reason of the alleged assignment by Duer to Gilmore, and for more than ten years to assert any claim pursuant to the decision of the Supreme Court in Webster v. Luther, or the changed ruling of the department, justified the Government in assuming that such claim had been abandoned and its former attitude in reference thereto as having been acquiesced in, and warranted it in acting pursuant to such assumption; that the Government having so acted, plaintiff is estopped to assume a contrary attitude in this litigation.

FIRST. THAT THE POWER EXECUTED BY DUER TO GILMORE DID NOT CONSTITUTE A TRANSFER OF DUER'S ADDITIONAL HOMESTEAD RIGHT.

Prior to the decision of the Supreme Court in 1896 in the case of *Webster* v. *Luther* (*supra*), the Land Department held that the soldiers' additional right granted by section 2306 of the Revised Statutes was not assignable, and could be located only by the soldier and for his own benefit. For the purpose of evading this ruling powers of attorney were given by those owning rights, authorizing the location thereof, and the sale of the land thus located, but, for obvious reasons, no notice was ever given of the existence of such powers. The location of the right upon the tract of land and subsequent sale under the power of attorney would operate to transfer the land located, notwithstanding the right itself might not be assignable.

There is nothing in the record, except an averment in the complaint, which is inconsistent with the instrument itself set forth as an exhibit, to show that the power of attorney given to Gilmore was intended to operate as a transfer of the right. Indeed, had there been any such evidence at the time of its presentation to the Land Department, the claim would have been rejected on that account alone, because the department held at that time that the right was not assignable. The parties acted in the light of that attitude; consequently, the instrument was not intended to and could not under that ruling attach to the soldiers' right itself, but only to the subject matter resulting from the exercise thereof, hence the situation of the parties comes clearly within the ruling announced in *Taylor* v. *Burns* (203 U. S., 120–126), where the court said:

> It was not a power of attorney coupled with an interest. But the phrase "coupled with an interest," is not meant an interest in the exercise of the power, but an interest in the property on which the power is to operate. (*Hunt* v. *Rousmanier's administrators*, 8 Wheat., 174.) * * * It was an interest in the exercise of the power and not an interest in the property upon which the power was to operate.

Having under consideration the effect of powers of attorney to locate and sell the land located, granted to Sioux half-breed Indians by the act of July 17, 1854 (10 Stat., 304), the Supreme Court of the United States has held that the execution of such a power does not constitute a transfer of the scrip as such. The court referred to and approved the decisions of the Supreme Court of the State of Minnesota in the cases of *Gilbert* v. *Thompson* (14 Minn., 544), and *Thompson* v. *Myrick* (20 Minn., 205), and said:

> The power of attorney, however, was given full legal effect as authority to sell the land located. It is true the court excluded parol evidence of an intention to transfer the scrip. But why? Manifestly, because the transactions did not constitute a transfer of the scrip as such and their legal character could not be destroyed by parol proofs that they were intended to be something else. In other words, the court decided that the transactions were intended as a conveyance of the land and represented that intention and could not be shown to be a transfer of the scrip. (See p. 616.) *Midway Co.* v. *Eaton*, 183 U. S., 602.)

In that case the powers were similar to the one involved herein, namely, to locate the scrip and sell the land located. There the law was plain that the right or scrip itself was not assignable, and the court held that, while the location and sale of the land under such power would operate as a transfer of the land when located, it was not in violation of the act which declared the scrip itself to be not assignable.

So in this case, under the ruling then in force the soldiers' additional right was held to be not assignable, and in order to evade that ruling the right was located under powers of attorney authorizing the agent to locate the right and sell the land. But, as held by the courts in the case cited, the power must be given its legal effect, and parol evidence is not admissible to alter or contradict it.

See also for a case involving power in precisely the same terms as the one in the instant case, *Douglas* v. *DeLaittre* (55 Fed., 873). (*Freeman* v. *Rahn*, 58 Cal., 111–115.)

The Texas cases cited by appellant are inconsistent with the case of *Midway* v. *Eaton* (*supra*), and can not be here regarded as authority.

SECOND. SAID POWER WAS CONFINED TO A PARTICULAR TRACT AND MANDAMUS IS NOT AVAILABLE TO COMPEL ITS APPLICATION TO ANOTHER AND DIFFERENT TRACT.

The only information communicated to the department as to the relations between Chipman and Duer was by means of the application signed by the latter, and filed at the Sacramento land office, to locate a specific tract of land, the description of which was inserted in the power delivered to Gilmore; the power of substitution in the latter instrument was not as to the land to be located, but was confined to changing the repository of the authority; the power of sale and to appropriate the proceeds thereof did not authorize a sale of the soldier's right, but was limited to the *lands to be located* by the exercise, in the soldier's name, of that right. The instrument was, therefore, special; that is, a limited authority to locate a described tract; when filed in the Land Department this paper, if notice of anything, constituted notice of nothing more than appeared upon its face, to wit, that Gilmore was authorized to locate the right upon a certain tract of land.

THIRD. THAT DUER HAD THE POWER (AT HIS OWN PERIL AS TO PERSONAL ACCOUNTABILITY) TO VIOLATE THE CONTRACT WITH GILMORE, WHICH WAS SUCCEEDED TO BY CHIPMAN, AND THIS HE DID EFFECTIVELY, AND REVOKED THE POWER BY HIS PERSONAL LOCATION MADE SEPTEMBER 20, 1875, AND BY THE FURTHER LOCATION OF KING AS ASSIGNEE OF DUER MADE JULY 14, 1903.

A distinction is to be noted between a principal's power to revoke his agent's authority and his right to revoke it. Although, as has been stated, he has the undoubted power, so far as the agency is executory, to revoke the agent's authority, it by no means follows that he has always a right to do so, since the contract of agency may provide otherwise. Accordingly, if he revokes the agency in violation of the contract, he becomes liable to the agent for the damages caused thereby. However, it should be observed in this connection that the agent is limited to his action for damages; the courts will not specifically enforce the contract against the principal. (31 Cyc., p. 1300.)

It is, of course, true as a rule of the law of agency that where an agency is created, coupled with an interest,

while the principal may revoke the agency at any time, he can do so subject only to the resulting liability of paying the agent any damages by reason of the termination of the agency contrary to the terms of the contract creating it.

Milligan v. *Owen* (Iowa), 98 N. W., 792.
Love v. *Simms*, 9 Wheat., 515–525.

The Land Department had no notice even of the existence of the special power in the hands of Gilmore or Chipman when, on September 20, 1875, Duer personally located his soldier's additional right on 40 acres of land in Missouri, and that location was accordingly allowed. Under the ruling then in force, notwithstanding such location involved a less quantity of land than the soldier was entitled to enter, the department held that it exhausted Duer's right; consequently, under that holding Duer thereby effectually revoked the outstanding power of attorney to Gilmore by destroying the subject-matter on which it was to operate, and when the location of 80 acres in California was attempted, it was, on September 13, 1876, rejected, the attorney in fact making no objection or protest against, and refusing to avail himself of the suggested right of appeal from such action; on the contrary, the latter, on February 26, 1881, five years thereafter, successfully made demand for refund of the fees and commissions paid on the California location, assigning as the basis thereof that the location had been "found to be fraudulent and *void*," thus effectively clinching his assent to and acquiescence in the judgment of the Land Department.

By the regulations in force on July 14, 1903, when the location was made by King as Duer's assignee, it was provided that "the applicant must furnish * * * the affidavit of the soldier that he has in no other manner exercised his homestead right than by making the original entry * * *. Affidavits to establish the material facts necessary to the proof of the existence of the right *in the applicant* * * * may be executed * * *." Necessarily an affidavit showing the right in the applicant would be inconsistent with the existence of another assignee of the same right, and when that location was allowed the Government had not only the long acquiescence of Chipman, but sworn statements showing that King was properly entitled to make such location.

FOURTH. THAT CHIPMAN, BY APPLYING FOR AND RECEIVING ON DECEMBER 12, 1882, REPAYMENT OF THE FEES AND COMMISSIONS PAID TO THE GOVERNMENT ON ACCOUNT OF HIS ATTEMPTED LOCATION OF THE 80 ACRES OF LAND DESCRIBED IN THE POWER TO GILMORE, ACQUIESCED IN AND ACCEPTED AS CORRECT THE RULING OF THE DEPARTMENT, WHICH HE NOW CLAIMS TO BE ERRONEOUS.

Four years after the rejection of the application of Duer, filed by Chipman at the Sacramento land office, Congress passed an act providing for the repayment of fees and commissions paid upon locations of so-called "soldiers' additional homestead" claims, which, after location, were "found to be fraudulent and void" (21 Stat., 287), and in 1882 Chipman filed demand thereunder for repayment of moneys expended on the Duer claim, alleging said location to have been "found to be fraudulent and void and the entry or location made thereon canceled." (Record, folio 17.)

Referring to said location, the Commissioner of the General Land Office said that the same was "held for cancellation for the reason that the party (Duer) had already exhausted his rights" by the location made September 20, 1875, and the local officers were directed to advise Duer that he would be allowed sixty days in which to appeal.

The rejection of application to enter under this special power, if erroneous, gave to the person injuriously affected the right of redress, which he could pursue or not; the commissioner, however, could not presume that his action, undisturbed by appeal, and which he considered correct, was erroneous, nor could the department presume that a power to locate a particular tract of land in California would thereafter be presented as authority to enter another tract in Nebraska. Chipman did not appeal, and thereby, as well as by accepting repayment of said fees and commissions, he acquiesced in the ruling of the department that Duer's right had become exhausted and that no right existed by reason of the Duer-Gilmore transaction.

Appellant contends that by filing claim for reimbursement, as heretofore set forth, Chipman put the department on notice that Duer had transferred his right to appellant's

predecessor, and, as a consequence, that the allowance of any location inconsistent therewith was at the Government's peril. The claim filed by Chipman, however, contained nothing more than a recital that he had purchased Duer's right from M. J. Wine, and had located the same under "supposed authority;" it was notice of nothing more than the expression of a doubt on Chipman's part as to the effectiveness of the right which he *supposed* he had; but it was not such notice to the officers of the department as that the latter, even twenty-five years later, must act at their peril and the peril of the Government upon any assertion of the right by another.

FIFTH. THAT CHIPMAN'S ASSENT TO THE REJECTION OF THE ATTEMPTED LOCATION ON OCTOBER 7, 1875, AS UNAUTHORIZED AND INVALID, THE FAILURE OF PLAINTIFF AND HIS PREDECESSORS IN INTEREST FOR MORE THAN TWENTY YEARS TO ASSERT ANY CLAIM BY REASON OF THE ALLEGED ASSIGNMENT BY DUER TO GILMORE, AND FOR MORE THAN TEN YEARS TO ASSERT ANY CLAIM PURSUANT TO THE DECISION OF THE SUPREME COURT IN WEBSTER *v.* LUTHER, OR THE CHANGED RULING OF THE DEPARTMENT, JUSTIFIED THE GOVERNMENT IN ASSUMING THAT SUCH CLAIM HAD BEEN ABANDONED AND ITS FORMER ATTITUDE IN REFERENCE THERETO AS HAVING BEEN ACQUIESCED IN AND WARRANTED IT IN ACTING PURSUANT TO SUCH ASSUMPTION; THAT THE GOVERNMENT HAVING SO ACTED, PLAINTIFF IS ESTOPPED TO ASSUME THE CONTRARY ATTITUDE IN THIS LITIGATION.

On this branch of the case we consider it immaterial whether the transaction between Duer and Gilmore constituted a sale or transfer of Duer's right or not.

When Duer's application filed by Chipman was denied because of previous exercise of the right of entry, Chipman had, as heretofore stated, opportunity to secure complete redress against Duer by proceeding for the recovery of the land located by the latter, and against the Government by appeal from the decision as therein suggested. He did neither.

Suppose that he were, at this late day, after standing by for more than thirty years, to attempt to have it declared

that Duer's title to the 40 acres located by him in person was impressed with a trust by reason of the violation of the Gilmore transaction; manifestly, he would have no status as a litigant even assuming the documents delivered to Gilmore constituted an absolute transfer of title as between the two.

> It appears that nineteen years and three months were suffered to elapse before any application was made for the execution of the trust. * * * No reason is assigned for this delay, nor is it alleged to have been occasioned in any degree by obstacles thrown in the way by the appellant. As the record stands, it would seem to have been the result of mere negligence and laches. * * * There must be conscience, good faith, and reasonable diligence to call into action the powers of the court. * * * The rule upon this subject must be considered as settled by the decision of this court in the case of *Piatt* v. *Vattier* (9 Pet., 416); and that nothing can call a court of chancery into activity but conscience, good faith, and reasonable diligence; and where these are wanting, the court is passive, and does nothing; and, therefore, from the beginning of equity jurisdiction, there was always a limitation of suit in that court.
>
> *McKnight* v. *Taylor*, 1 How., 162–167, 168.

While some delay in the assertion of a right is always an essential element of laches, unreasonable delay alone, independently of any statute of limitations, will often operate as a bar to relief.

16 Cyc., 152.

* * * Courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and can not be excused but by showing some actual hinderance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor.

Badger v. *Badger*, 2 Wall.; 69 U. S., 87, 94.

So, also, in the case of *Moran* v. *Horsky* (178 U. S., 205), the same court said:

> One who, having an inchoate right to property, abandons it for fourteen years, permits others to acquire apparent title, and deal with it as theirs, and as though he had no right, does not appeal to the favorable consideration of a court of equity. * * * A neglected right, if neglected too long, must be treated as an abandoned right which no court will enforce. * * * There always comes a time when the best of rights will, by reason of neglect, pass beyond the protective reach of the hands of equity. * * *

When the Duer application, filed at Sacramento, was rejected in 1875, it was the duty of plaintiff's predecessor in interest to appeal from the commissioner's decision. Had he done this and been defeated, precisely the same remedy would have been open to him which he attempts to assert here; in other words, this is not the assertion of a new right, or an attempt to redress a modern injury, but an effort to revive a right whose original creation was clouded in obscurity and which has become defunct through the lapse of almost a third of a century.

The rule as to vigilance in pursuit of remedy by mandamus is much more stringent than that governing equitable remedies.

> The courts require those who would avail themselves of the assistance of this writ to be prompt in demanding the enforcement of their rights. By lapse of time the necessary evidence is lost, and third parties may acquire rights growing out of the existing state of affairs. Where the parties have been guilty of unreasonable delay in applying for this writ, the courts have not hesitated to refuse such relief, unless the delay was accounted for to their satisfaction.
>
> Merrill on Mandamus, section 87.
>
> *Avery* v. *Krakow*, 73 Mich., 622.
>
> The writ of mandamus is discretionary, and in my opinion it should not be granted in a case like the present, where no effort is made to excuse the delay other than the relator insisting upon strict legal right.
>
> The action of the corporation and of its secretary * * * may have been arbitrary and illegal, but clearly the relator could accept such action, and there must be some period of time which a knowledge of the facts and acquiescence therein would by all be conceded

as sufficient ground upon which to deny a discretionary remedy like the one sought for in the present case. *Bostwick* v. *City of Detroit*, 49 Mich., 513, 514.

If the claims in question were ever tenable on mandamus, they arose more than ten years before the application, and the relator was then as well informed of their existence as he is now. * * * As respects this remedy, the demands have become stale, and public policy is against extending it to such cases.

In a case in the State of New York, where the delay was only for a year, the supreme court refused the writ. They said: "Here has been a delay of a year since the happening of the errors complained of, and the fact of the party's having been advised that his remedy was by writ of error, furnishes no excuse. This court will not by mandamus disturb proceedings in which parties have so long acquiesced."

People v. *Seneca*, Com. Pleas, 2 Wend., 264.

Walcott v. *Mayor of Jackson*, 51 Mich., 249–251.

It would be utterly impossible for the Interior Department of the Government to administer the soldiers' additional homestead law if parties claiming an interest, such as is claimed by the appellant in this case, can be heard after so great a lapse of time to assert such a right as this.

The judgment of the supreme court of the District was correct and should be affirmed.

Respectfully submitted.

OSCAR LAWLER,
Assistant Attorney-General.
F. W. CLEMENTS,
First Assistant Attorney.
S. W. WILLIAMS,
Assistant Attorney.

O

IN THE

Court of Appeals, District of Columbia

APRIL TERM, 1910.

THE UNITED STATES, *ex rel.*,
FRANCIS M. WALCOTT, *Appellant*,
vs.
RICHARD A. BALLINGER,
Secretary of the Interior.
} No. 2122.

REPLY BRIEF FOR APPELLANT.

CHARLES A. KEIGWIN,
F. W. McREYNOLDS,
Attorneys for Relator.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Court of Appeals, District of Columbia

APRIL TERM, 1910.

THE UNITED STATES, *ex rel.*,
FRANCIS M. WALCOTT, *Appellant*,
vs.
RICHARD A. BALLINGER,
Secretary of the Interior.
} No. 2122.

REPLY BRIEF FOR APPELLANT.

In the brief filed on behalf of the appellee no mention is made of the objections, urged in the court below, that the court is without jurisdiction; that Chipman had presumptive notice of the application of King; and that the Department, irrespective of what Chipman's rights may be, has exhausted its power by granting to Duer and his assigns 160 acres of land. We assume, therefore, that these contentions are abandoned.

On pages 3 and 4 of their brief counsel for appellee have erred in stating that the record shows only the department's rejection of Walcott's application for 80 acres on October 26, 1908, and his subsequent relinquishment, April 21, 1909,

of 40 acres of said application. Walcott's petition distinctly alleges (Record, p. 4) the **final** rejection of his application by the Department on **June 29, 1909,** and a certified copy of said decision is attached to the petition as "Exhibit D" (Record, p. 10.)

To support the contention that the power to sell executed by Duer was not an assignment of his additional right, appellee relies upon two Minnesota cases and that of Midway Co. vs. Eaton, 183 U. S., 602. On page 611 of this last decision the Supreme Court sets out the power in one of the Minnesota cases referred to, and an examination of the record shows the power in the Midway case to be almost identical. It is a simple power to sell land, under which the attorney was compelled to account to his principal for the proceeds of the sale—similar to one that would be given by an owner to a real estate agent. It was a totally different instrument from that given by Duer, for under the latter all claim to the proceeds of the sale was expressly relinquished to the attorney and he was relieved from all accountability.

Nor are the cases of Douglas vs. DeLaittre (55 Fed., 873) and Freeman vs. Rahn (58 Cal., 111), in point. The decision in the latter case was based wholly on the State probate laws. The former was a case in which the grantee under a power similar to the Duer power conveyed, as attorney in fact for the grantor, the land covered by the power for a valuable consideration, and deed was duly recorded. Some years later, in fraud of his former conveyance, this attorney in fact gave a personal quit claim deed for the land to the plaintiff, who thereupon attempted to eject the owner holding under the first deed. Naturally the court declined to allow the fraud to prevail.

Such a power as Duer gave was, as has always, and correctly, been held by the Department, not merely a power

to sell land, but also a transfer and assignment of the additional homestead right. In the case of John M. Rankin, 30 L. D., 486, where the additional right of one Estes had been partly exhausted by an entry under a power similar to the Duer power, and Rankin, as assignee of such attorney in fact, claimed ownership of the unused portion, Secretary Hitchcock said:

> "It is thus evident, from an inspection of the papers * * * that Estes applied to enter no particular land, but delivered with his foregoing power of attorney a blank application to be filled up as the holder of the power might elect. The holder might have filled it for lands amounting to the full right of 120 acres. It is also clear, from the fact that the application itself then contained no description of lands, and the further fact that in the usual course of such transactions at that time this power of attorney was itself blank, that the description of lands and name of the attorney in fact were not at that time contained in the power."
>
> "Manifestly what Estes and the purchaser had in view was no particular land identified by description, but the right itself, which was to be exercised by the purchaser or holder to his own use and benefit, but in the name of the grantor." * * *
>
> "It must be held, therefore, that Estes, by the papers executed, sold and assigned his right and vested the grantee of his power with full ownership thereof."

In the case at bar Walcott alleges in his petition (Record, p. 2) that the power and application of Duer were executed and delivered in blank as to description of land, making the case similar in all respects to the Rankin case, and these allegations are not questioned in the answer of the respondent (Record, p. 15).

In the case of F. W. McReynolds, 33 L. D., 243, where a soldier had transferred his additional right by means of a power similar to the Duer power (in the entry wherewith

the right had not been wholly exhausted), and had later attempted to personally assign the unused portion thereof, the Department held:

> "The device of powers of attorney to locate and sell and convey the land was the means by which contracts of assignment were effected while express assignments were not recognized. * * * The subsequent declaration of the soldier was but his construction of his former contract, and could not be entitled to control or limit it."

And referring to another similar power, under which ownership of an additional right was claimed, the Department, in the case of F. W. McReynolds, 37 L. D., 104, said:

> "This instrument operated as an absolute sale and assignment of the soldier's additional homestead right, vesting in Chipman and his assigns whatever right, title and interest the widow of the soldier may have possessed, with power to use the name of the assignor in the location of the right, and the sale of the land located thereunder. Thereafter Mrs. Barbour (the grantor of the power) had no right, title or interest either in the additional right or the land."

Walcott, in purchasing the Duer additional right, based on his power to sell executed in 1875, had a perfect right to rely on the Departmental construction which had been placed on such powers by an unbroken line of decisions for more than thirty years. He should be protected in such purchase, and the defendant should be estopped from denying that said power was a transfer of the right.

A very recent decision of the Land Department illustrates clearly the difference between powers to sell such as that in the Midway vs. Eaton case, and that given by Duer. The Department said:

"A mere power of attorney to locate an additional right and to sell the land located therewith does not vest the attorney in fact with any right except as agent for his principal, and if the soldier dies before the location of the right under such powers they would be revoked by the death of the soldier and the right would remain as an asset of his estate."

"If, however, there is a disclaimer by the maker of the power of all right to, or interest in the proceeds of the sale, in consideration of a cash payment to the soldier, as in the case of John M. Rankin (30 L. D., 486), it is a sale and assignment of the right which divests the soldier of all his right, title and interest and vests the same in his assignee with power to sell and assign the right to others."

D. N. Clark, 37 L. D., 116 and 264.

The contention that Duer could and did revoke his power to sell, upon which much reliance is placed by appellee, is not only directly opposed to the doctrine of the U. S. Supreme Court as laid down by Chief Justice Marshall in Hunt vs. Rousmanier, 8 Wheaton, 174, but is not supported by the cases cited. The case of Milligan vs. Owen, 98 N. W., 792, was one in which a real estate broker sued for damages resulting from loss of commissions caused by revocation of an agency which was claimed to have been given to sell certain real estate. While the language quoted is used, it is misleading when separated from its context, as it has relation wholly to the facts just stated. And the case of Love vs. Simms, 9 Wheat., 515, was one arising under the registry laws of Tennessee, and the court's decision was based on those laws. The power was a simple power to sell, as in the Midway case, and the decision can have no possible bearing on the questions raised here. And the quotation from "Cyc." is taken from the chapter on "Principal and Agent," devoted to the relations between owners of property and real estate brokers, etc. In the

preceding chapter, devoted to "Powers," a full discussion of the subject will be found. We quote:

> "A mere naked power is revocable at the will of the donor or grantor; but when a power is coupled with an interest, or is given for a valuable consideration, it is irrevocable." 31 Cyc., 1051.

> "A naked power of sale vests no interest in the subject-matter in the donee. But when the instrument creating the power manifests an intention that the donee shall have all the beneficial interests in the property, it vests the title in him." Citing Travis Co. vs. Christian (Tex. Civ. App., 1892, 21 S. W., 119), 31 Cyc., 1091.

In conclusion, it is submitted that the original error of the Department in rejecting Chipman's application to use the Duer right in 1875; the absence of any statutory limitation as to when an additional homestead right must be exercised; the absence of any law authorizing the registering in, or giving notice to, the Department of transfers of such rights, and the total failure of the Department to remedy this situation by rule or regulation, takes this case out of that class in which laches may be charged.

CHARLES A. KEIGWIN,
F. W. McREYNOLDS,
Attorneys for Relator.